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No. 04-

IN THE

Supreme Court of the United States

GLENDALE FEDERAL BANK, FSB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit erred in holding – contrary to decisions of this Court and in conflict with decisions of the Ninth and Tenth Circuits – that special pro-government rules apply to limit when restitution is available to private parties in breach of contract actions against the government, including that (i) restitution may not exceed the plaintiff's losses; (ii) restitution is unavailable as a matter of law where the plaintiff's performance was the assumption of liabilities; and (iii) the plaintiff's restitution interest must be measured not at the time of performance, but based upon subsequent events.

PARTIES AND RULE 29.6 STATEMENT

The parties to the proceeding are listed in the caption. Pursuant to Supreme Court Rule 29.6, petitioner Glendale Federal Bank, FSB states that all parent corporations and publicly held companies that own 10 percent or more of the stock of Glendale Federal Bank, FSB are: Citibank (West), FSB, which is a wholly owned subsidiary of Citibank (West), Holdings, Inc., which is a wholly owned subsidiary of Citibank (West), Bancorp Inc., which is a wholly owned subsidiary of Citicorp Banking Corporation, which in turn is a wholly owned subsidiary of Citicorp. Citicorp is a wholly owned subsidiary of Citigroup Holdings Company, which in turn is a wholly owned subsidiary of Citigroup Inc., which is publicly traded.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Glendale Federal Bank, FSB ("Glendale") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The first opinion of the court of appeals remanding the case to the United States Court of Federal Claims ("trial court") is published at 239 F.3d 1374 (Fed. Cir. 2001) and appears in the Appendix of this Petition ("Pet. App.") at 22a-38a. The second opinion of the court of appeals reviewing the trial court's remand decision is published at 378 F.3d 1308 (Fed. Cir. 2004) and appears at Pet. App. 1a-9a. The trial court's first decision is published at 43 Fed. Cl. 390 (1999) and appears at Pet. App. 39a-79a. The trial court's decision on remand is published at 54 Fed. Cl. 8 (2002) and appears at Pet. App. 10a-21a.

JURISDICTION

The court of appeals entered judgment on August 9, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1). Because Glendale has filed a timely petition for certiorari from the Federal Circuit's final decision, this Court has jurisdiction to consider Glendale's challenges to the appellate court's prior, interlocutory decision. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam); see also R. Stern et al., *Supreme Court Practice* § 2.3, at 75, § 6.4, at 359 (8th ed. 2002).

RELEVANT PROVISIONS OF STATUTORY AND OTHER FEDERAL LAW

This petition presents questions under the federal common law of contracts.

INTRODUCTION

The last time the Court reviewed this case, it forcefully reiterated the longstanding rule that normal principles of contract law apply to contract disputes between the government and private parties. See *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (plurality opinion). There is no exception to that rule for big cases. Despite this rule's long pedigree, recent rearticulation by this Court, and sound basis in public policy, however, the Federal Circuit countermanded it on remand.

In reversing the trial court's restitution award to Petitioner Glendale Federal Bank F.S.B. ("Glendale"), the circuit court demonstrated a remarkable hostility to the time-honored remedy of restitution. Most glaringly, it improperly limited the measure of restitution to cost to the plaintiff rather than benefit to the defendant. This holding is contrary to hornbook contract law and to this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000), which ordered restitution even though the plaintiff suffered "no damage." *Id.* at 623.

The Federal Circuit compounded its error by holding that restitution was simply unavailable as a matter of law in cases, like this one, in which the benefit conferred on the government is the assumption of legally binding liabilities and would be greater than the plaintiff's reliance damages. Put differently, faced with the consequences of applying standard contract law principles to a remedy against the government in a *Winstar* case, the court blinked. It created an exception to the general applicability of contract-law

principles to save the government from the full remedies available for its breach. And in making restitution unavailable as a matter of law, it created a circuit split with the Ninth and Tenth Circuits.

So strong was the court's distaste for restitution that it refused even to order return to Glendale of *cash payments* that Glendale made to the government as part of the contract that was breached. This part of the circuit court's decision so clearly flouts *Mobil* that it provides grounds for summary reversal. The square holding of *Mobil* is that where, as here, the government commits a material breach, it must give restitution of the plaintiff's cash payments to the government. *Id.* Yet here the Federal Circuit vacated the portion of Glendale's restitution award covering its cash payment to the government.

The Federal Circuit's decision also conflicted with settled principles of contract law in yet another respect. The Federal Circuit improperly took into account events subsequent to Glendale's contractual performance when assessing the benefit Glendale conferred on the government for purposes of calculating restitution. This ruling violated principles of contract law, which require that the benefit be measured at the time of the plaintiff's performance, and also conflicts with a decision of the Tenth Circuit, which correctly deemed subsequent events irrelevant to proper restitution analysis.

Absent review by this Court, the harm that would result from the Federal Circuit's new big-case exception to normal contract principles would be severe. It would not only apply in the 45 remaining *Winstar* cases (involving billions of dollars in possible contract remedies) but would also have serious consequences for all government-contract cases in which the Federal Circuit already hesitates to impose substantial contract remedies on the government. The impact would be particularly deleterious in cases, such as this one, in which the benefit conferred on the government by a private

party includes something other than cash and whose value can therefore fluctuate over time.

The ultimate loser from the Federal Circuit's approach would be the government itself. The prohibition on special pro-government contract rules actually benefits the government in the long run by lowering the cost of contracting. See *Winstar*, 518 U.S. at 883 (special pro-government contract rules are "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies"); *id.* at 913 (Breyer, J., concurring) (applying normal contract rules to the government "ensures that [it] is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting."). Accordingly, the Federal Circuit's special pro-government rules in this case would in the long run increase the government's contract costs.

STATEMENT OF THE CASE

This case, like other so-called "*Winstar* cases," has its roots in the savings and loan crises of the 1980s. In 1981, Glendale entered into a contract with the United States whereby it assumed the massive net liabilities of First Federal Savings and Loan Association of Broward County ("Broward") in return for the government's promise to provide Glendale with favorable regulatory capital treatment.[1] Under the government's promise, Glendale was allowed to record a goodwill asset in the amount of Broward's net liabilities that counted as regulatory capital and that would be phased out over 40 years. *United States* v. *Winstar Corp.*, 518 U.S. 839, 910 (1996) (plurality opinion). However, in 1989, after

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[1] In the transaction, Glendale both acquired Broward's assets, *i.e.*, loans, and assumed its liabilities, *i.e.*, deposits, but the liabilities assumed far outstripped the market value of the assets. The difference constituted Broward's "net liabilities."

Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, the government repudiated its contract with Glendale. In a previous decision in this case, this Court concluded that this repudiation subjected the government to the established remedies for breach. *Id.* at 909-10.

On remand from the Supreme Court's affirmance of liability, the trial court found that Glendale had conferred a substantial benefit on the government when Glendale agreed to assume the massive liabilities of Broward and thereby excused the government from either operating or liquidating the failed thrift. Pet. App. 66a ("The government received a very significant benefit in 1981, when Glendale merged with Broward.").

The record amply supported the trial court's finding. At the time of the agreement between Glendale and the government, Broward was on the verge of inevitable collapse and government takeover. See J.A., *Glendale Fed. Bank, FSB* v. *United States*, No. 99-5103, -5113 (Fed. Cir. filed Dec. 13, 1999), at A1014833-42, A1014901, A1002769-70, A1002870-71, A2001172. In fact, the Federal Home Loan Bank Board ("FHLBB") found that merging Broward with Glendale was necessary "to prevent the failure of Broward" and thus some form of expensive government takeover. *Id.* at A2001100-02, A1014857.

In contrast to Broward, the facts showed that Glendale had the financial strength to give the government the benefit that it sought. In 1981, the government's regulators found that Glendale was a "very strong institution." *Id.* at A1002877-78. In September 1981 the regulators found that Glendale had no material problems, and in November 1981 they determined that Glendale had the strength to absorb Broward's net liabilities and remain viable for at least 20 years. *Id.* at A1002907-10, A1000266, A1000281-82, A1000319, A2001157. Glendale itself projected its future profitability,

even if interest rates did not move lower. *Id.* at A2000422, A1010054-59.

Thus, the trial court found that Glendale had "the ability . . . going forward to be viable, and to take [from the government] responsibility for managing – and paying – the liabilities of Broward as they came due." Pet. App. 68a. As the trial court found, "[Glendale] had something that the government wanted: a healthy thrift that had managed the sustained high interest rates much more successfully than Broward, and which was poised to survive." *Id.* Accordingly, the trial court found that the government viewed Glendale's merger with Broward as "a permanent solution" to the government's obligation to either liquidate Broward's three-quarters of a billion dollars in excess liabilities, or assume the likely greater cost of operating Broward itself. *Id.* at 70a ("the testimony adduced [from government regulators] . . . confirms that the parties viewed this [merger] as a permanent solution").

The trial court found that the value of the benefit that Glendale conferred on the government at the time of performance was $798,291,000. Pet. App. 71a, 76a. This amount reflected the government's calculation in November 1981 of "the market value of the excess of Broward's liabilities over its assets," which Glendale assumed pursuant to the contract, so that "the government was similarly relieved of its obligations for those liabilities." *Id.* at 67a n.7, 69a-70a; see also *id.* at 69a-70a ("Glendale assumed the liabilities of Broward, every dollar of them, and [Glendale] . . . was responsible for ensuring that Broward's operations, and most relevantly, its obligations as they became due, would be met by Glendale. At that time, the entire operations of Glendale, including its capital, were pledged to that effort, and the government was similarly relieved of its obligation for those liabilities.").

The trial court further found that,

> the regulators who engineered the deal *at the time it was made* valued the benefit [of Glendale's performance] to the government at three-quarters of a billion dollars, or roughly what Glendale currently says was the immediate benefit to the government. FHLBB Chairman Richard Pratt stated [on November 19, 1981] that "the solution which FSLIC found is one which appears to *save the people of the United States . . . approximately three-quarters of a billion dollars*." Moreover, far from considering this deal valueless . . . FSLIC Chairman Beesley [stated] at the time that he did not think the government would "ever see a deal like this one in terms of its benefit to the FSLIC." The government's own statements at the time do not support its currently articulated litigation theory that the contract provided no benefit to the government or the people of the United States.

Pet. App. 70a-71a (second emphasis added).[2] The trial court offset the government's benefit of $798 million with amounts that reduced the massive deficit of the Florida franchise until Glendale sold it in 1994. This offset resulted in a net award of $509.921 million. *Id.* at 76a.

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[2] *See also Winstar Corp.* v. *United States*, 64 F.3d 1531, 1537 (Fed. Cir. 1995) ("By the government's estimates, the . . . merger saved the government approximately three quarters of a billion dollars."), *aff'd*, 518 U.S. 839 (1996). Because no other Florida thrifts were strong enough to absorb Broward's liabilities, at the time of the merger the FHLBB found that the government's only options were: (1) the Glendale merger; (2) immediate liquidation of Broward (resulting in a loss to the government of $798 million); and (3) a government takeover and operation of Broward. *See* Federal Circuit J.A. at A200440, A2000480, A1014901, A2001150-52, A2001168-69. Government operation of a failing thrift usually cost more than immediate liquidation and thus the trial court found that "if Broward was not liquidated a more likely government takeover would have significantly expanded the loss to the government beyond the immediate liquidation loss" of $798 million. Pet. App. 69a.

The trial court also awarded restitution of an "additional" $18.24 million that Glendale paid directly to the government under a contract provision in which Glendale agreed to pay the government if interest rates moved below an agreed-upon level:

> Plaintiff also seeks restitution in the amount of $18.24 million that Glendale paid to the government under the interest rate shifting provision of the contract. The government argues that this portion of the contract is discrete and fully performed by both parties so that recovery is unwarranted. Plaintiffs put forward persuasive evidence that this provision was negotiated as part of the overall agreement, and that the terms of the overall contract would have been altered, had the government not agreed to grant a 40-year amortization period. As the affidavit of David Hansen indicates, had Glendale not received the benefit of the 40-year amortization protection it would have demanded other modifications, including greater interest rate protection and other government assistance. It is impossible to treat the provision as autonomous, and plaintiff is entitled to the return of these payments, the amounts of which are not challenged by the government, as restitution of a benefit conferred on the government.

Pet. App. 71a-72a.

Finally, the trial court awarded $380,787,000 in reliance damages for wounded bank costs (*i.e.*, from higher payments to depositors and regulators) that Glendale suffered because the government's breach drove Glendale to the brink of a government seizure. These wounded bank costs did not overlap with either component of restitution. Pet. App. 75a-76a. The court noted that it was proper to combine restitution with "non-overlapping" reliance damages. *Id.* at 74a (citing *CBS, Inc.* v. *Merrick*, 716 F.2d 1292, 1296 (9th Cir. 1983)). The aggregate award of restitution and wounded bank reliance damages was $908.948 million. *Id.* at 76a.

On appeal of the initial award, the Federal Circuit held that basing restitution on the assumed net liabilities "ignores the reality of subsequent events as they impacted on the parties, and particularly the plaintiff." Pet. App. 37a. Specifically, the panel accepted the government's arguments that: (1) restitution is unavailable as a matter of law when post-performance events might have lowered the plaintiff's own losses to an amount below the value of the benefit the plaintiff initially conferred on the government; (2) restitution based on an acquiring thrift's assumption of the failed thrift's liabilities is unavailable as a matter of law in *Winstar* cases; and (3) restitution is measured not at the time of the plaintiff's performance, but at some time thereafter. *Id.* at 34a-37a.

Glendale's opening brief in the first appeal correctly noted that the government had not "challenge[d] the trial court's additional restitution award of $18,240,000." Brief of Pl.-Cross Appellant Glendale Fed. Bank, FSB at 18 n.4, *Glendale Fed. Bank, FSB* v. *United States*, 239 F.3d 1374 (Fed. Cir. 2001) (Nos. 99-5103, -5113). The Federal Circuit noted this additional restitution in discussing the case's history, Pet. App. 28a, but nonetheless vacated "the restitution award" in its entirety, without any exception for Glendale's $18.24 million in cash payments. *Id.* at 35a. Instead, the Court remanded "for a determination of total *reliance* damages." *Id.* at 38a (emphasis added).

On remand, the trial court reinstated its $380,787,000 award of reliance damages for Glendale's wounded bank damages. See Pet. App. 21a. The Federal Circuit subsequently affirmed. See *id.* at 9a. The second panel's opinion confirmed that the first panel had rejected restitution when based on assumption of the acquired thrift's liabilities as a matter of law. See *id.* at 8a ("Restitution as a generalized theory for recovery of assumed benefits to the Government . . . has been rejected."). In contrast, the second panel properly held that reliance damages and expectancy "lost profits" are issues of fact. See *id.* at 9a (reliance

damages turn on "factual determinations" that may not be reversed "absent a compelling showing of clear error"); *id.* at 8a ("We have not ... barred as a matter of law the use of expectancy/lost profits theory"). Glendale accordingly has a judgment for $380.787 million in reliance damages against the government, but has been denied both the trial court's restitution awards of (i) $509.921 million for the Bank's assumption of net liabilities and (ii) $18.24 million for its cash payments to the government (a total reversed restitution amount of $528.161 million).

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision violates the hornbook contract law principles this Court has made mandatory when the government breaches its contracts. Instead, the Federal Circuit has effectively carved out a big-case exception to the rule that the government is bound by the same contract-law principles that govern all other contracting parties. In doing so, it disregarded precedent from this Court on the importance of holding the government to the same standards that govern private contracting parties and, more specifically, on the scope of restitution remedies. Moreover, the decision conflicts with those of two other circuits. The errors are particularly significant because they were made in a decision that the Federal Circuit has explicitly given special precedential force, urging trial courts to use it as a roadmap for resolving *all* future *Winstar* cases.

Given the Federal Circuit's specialized appellate jurisdiction, this Court often grants petitions for writs of certiorari challenging decisions of that court that do not conflict with those of other courts. See Stern, *supra*, § 4.21, at 264-65. Among the Federal Circuit's areas of exclusive appellate jurisdiction are contract claims against the United States. See 28 U.S.C. § 1491(a)(1); *id.* § 1295(a)(3). This Court has reviewed important government contract cases from the Federal Circuit even absent a circuit split, as

illustrated by *Mobil*. Accordingly, this case, which presents fundamental questions about the nature and scope of remedies available when the government breaches a contract, would merit review even if there were no conflict among the lower courts.

This is the rare Federal Circuit contract decision, however, that does contradict decisions by other circuit courts. In fact, the decision below creates a split with the Ninth and Tenth Circuits on the appropriate standard of review of a restitution award in a *Winstar* case, and a second split with the Tenth Circuit on whether the *Winstar* plaintiff's restitution interest must be measured at the time of performance or rather be reduced based upon subsequent events.[3] The decision below merits review for this reason as well.

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS REQUIRING APPLICATION OF NORMAL CONTRACT PRINCIPLES TO GOVERNMENT BREACHES.

"'When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private parties.'" *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604, 607 (2000) (quoting *United States* v. *Winstar Corp.*, 518 U.S. 839, 895 (1996) (plurality opinion)). Put another way, when the government contracts with private parties, enforcement of those contracts is not governed by "special rules, not generally applicable to private contracts." *Winstar*, 518 U.S. at 860; see also *id.* at 895 & n.39. This principle applies equally to the availability and application of

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[3] Those cases were brought in federal district courts, as opposed to the United States Court of Federal Claims, because the defendants were federal agencies, not the United States. *See Far West Fed. Bank, S.B.* v. *Director, Office of Thrift Supervision*, 930 F.2d 883, 889, 892 (Fed. Cir. 1991) (affirming district court jurisdiction on this basis).

remedies. See *Priebe & Sons, Inc.* v. *United States*, 332 U.S. 407, 411 (1947) ("principles of general contract law" apply to enforceability of liquidated damages provision in contract with government).[4]

This Court forcefully reiterated these rules in its previous decision in this case. *Winstar*, 518 U.S. 839. There, the government sought to resist Glendale's breach of contract claim by invoking "four special defenses" unavailable to private parties. *Id.* at 860.[5] This Court rejected this request for special treatment, concluding that normal contract law principles governed the case. See *id.* at 910.

In contravention of this Court's instructions, on remand, the Federal Circuit adopted several special pro-government rules to limit artificially the government's liability. The three pro-government rules are: (i) restitution is limited to the plaintiff's losses; (ii) restitution is unavailable as a matter of law where the plaintiff's performance was the assumption of liabilities; and (iii) the plaintiff's restitution interest must be measured not at the time of performance, but based upon subsequent events. Each of these rules conflicts with hornbook contract law and hence with this Court's explicit instructions that the normal rules of contract law apply to disputes such as this one.

1. The Federal Circuit plainly violated this Court's rule requiring application of traditional contract law principles

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[4] *See also* 332 U.S. at 419 (Frankfurter, J., dissenting) (in argument rejected by majority, contending that scope of remedies available for breach of government contract should not be "subject to the ordinary rules of the law of contract").

[5] These were: "the canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms"; "the rule that an agent's authority to make such surrenders must be delegated in express terms"; "the doctrine that a government may not, in any event, contract to surrender certain reserved powers"; and "the principle that a Government's sovereign acts do not give rise to a claim for breach of contract." *Winstar*, 518 U.S. at 860.

when it rejected the trial court's restitution award on the ground that it "ignore[d] the reality of subsequent events as they impacted on the parties, and *particularly the plaintiff*." Pet. App. 37a (emphasis added). The court held that any restitution award that exceeded Glendale's "actual losses" was flatly unavailable, on the theory that it was inferior to reliance damages. *Id.* ("Reliance damages will permit a more finely tuned calculation of the actual losses sustained by plaintiff as a result of the Government's breach.").

This conclusion conflicts with this Court's decision in *Mobil*, which holds that restitution is based on the defendant's benefit and is available even if a plaintiff suffered "*no* damage." *Mobil*, 530 U.S. at 623 (emphasis added). *Mobil* involved payments made by oil companies to the government for lease contracts to engage in off-shore drilling. The companies sought return of those payments after the government breached its obligations regarding subsequent regulatory approvals for the drilling. The government contended that it should not have to return the money because the companies would not have been able to drill in any event because of other regulatory obstacles. See *id.*

"This argument," this Court held, "misses . . . the basic legal point." *Id.* The companies were entitled to restitution "whether the contracts would, or would not, ultimately have produced a financial gain or led them to obtain definite rights to explore." *Id.* at 624; See also *id.* at 608 ("[T]he Government must give the companies their money back . . . . whether the contracts would, or would not, ultimately have proved financially beneficial to the companies."). *Mobil* is in accord with general principles of contract law. See, *e.g.*, *Restatement (Second) of Contracts* § 370 cmt. a (1981) ("A party's restitution interest is his interest in having restored to him any *benefit* that he has conferred on the *other party*." (emphases added)); 1 D. Dobbs, *Dobbs Law of Remedies*, § 4.1(1), at 554 (2d ed. 1993).

The Federal Circuit disregarded both *Mobil* and the black-letter rule that when the defendant has materially breached, "the injured party is entitled to restitution for any benefit that he has conferred on the other party." *Restatement (Second)* § 373(1); *accord id.* §§ 344(c), 371; 3 E. Farnsworth, *Farnsworth on Contracts* § 12.19, at 319 (2d ed. 1998); 3 Dobbs, *supra*, § 12.7(1), at 161. Thus, when the defendant commits a material breach and "the benefit to the defendant of what has been furnished exceeds the cost or value to the plaintiff, there is no reason why recovery of this excess should not be allowed." 26 R. Lord, *Williston on Contracts* § 68:36 (4th ed. 2004); *accord* 22 Am. Jur. 2d *Damages* § 57, at 99 (2003); *Robertus* v. *Candee*, 670 P.2d 540 P.2d 540, 543 (Mont. 1983); *Horseshoe Estates* v. *2M Co.*, 713 P.2d 776, 779 (Wyo. 1986); *Noel* v. *Cole*, 655 P.2d 245, 250-51 (Wash. 1982).[6]

In contrast, the Federal Circuit's rule – that restitution for breach cannot exceed the plaintiff's loss – would render restitution meaningless as an alternative remedy for breach

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[6] Restitution also requires "the *return of the consideration* paid for an unperformed promise." *Restatement of Restitution*, pt. I, introductory note at 5 (1937) (emphasis added). This rule applies whether the plaintiff's consideration was "money or money's worth." *Nash* v. *Towne*, 72 U.S. (5 Wall.) 689, 702 (1866). Numerous common law decisions hold that contract performance includes not only cash expenditures, but also assuming the cost of a legally binding obligation, even if that cost has not yet been paid. *See, e.g.*, *Taylor* v. *Mark*, 376 S.W.2d 927, 928 (Tex. App. 1964); *Wartenbe* v. *Car-Anth Mfg. & Supply Co.*, 362 S.W.2d 54, 56-57 (Mo. Ct. App. 1962); *Ring* v. *The Dimitrios Chandris*, 43 F. Supp. 829, 832-33 (E.D. Pa. 1942), *aff'd*, 133 F.2d 124 (3d Cir. 1943); 22 Am Jur. 2d *Damages* § 88, at 120. Accordingly, the fact that Glendale did not pay $798,291,000 in cash to the government in 1981 is irrelevant because Glendale provided consideration of that "worth" by assuming all of Broward's liabilities. *See Winstar*, 518 U.S. at 843 (government provided goodwill promise "*in exchange for* [Glendale's] assumption of liabilities"); 17 C.J.S. *Contracts* § 99, at 566 (1999) ("The assumption of a liability, such as a debt owed by the promisor, at the request of the promisor is a valuable consideration." (footnote omitted)).

because reliance damages already include a plaintiff's cost of performance. See *Restatement (Second) of Contracts* §§ 344(b), 349; J. Calamari & J. Perillo, *The Law of Contracts* § 14-9, at 603 (3d ed. 1987). Yet, as this Court has recognized, the measure of reliance damages and restitution for breach are different. See *United States* v. *Behan*, 110 U.S. 338, 345 (1884).

The Federal Circuit's decision, accordingly, conflicts not only with this Court's general authority requiring adherence to contract law in enforcing government contracts, but also with the Court's specific holding in *Mobil*.[7]

2. So hostile was the Federal Circuit to restitution in this case that it refused to order return to Glendale of more than $18 million Glendale paid *in cash* to the government in performance of its obligations under the contract the government later breached.[8] As noted *supra* at 7-8, the trial court found that, as part of the contract, Glendale was required to pay (and paid) $18.24 million *directly to the*

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[7] Later Federal Circuit cases have relied on the first decision in *Glendale* to announce principles of restitution that are contrary to *Mobil*. First, *California Federal Bank, FSB* v. *United States* cited *Glendale* in rejecting a bank's claim for restitution "equal to the benefit conferred upon the government." 245 F.3d 1342, 1351-52 (Fed. Cir. 2001) (calling claim for restitution "nearly identical" to that rejected in *Glendale*), *cert. denied*, 534 U.S. 1113 (2002). Next, *Landmark Land Co.* v. *FDIC* cited *Glendale* for the proposition that the purpose of restitution is to "restore[] to the non-breaching party the *net loss that he suffered* as a result of his performance under the contract." 256 F.3d 1365, 1372 (Fed. Cir. 2001) (emphasis added) (citing *Glendale*, 239 F.3d at 1380). (The court in *Landmark* ultimately did not have to decide whether restitution could exceed reliance damages because they were the same in that case. *See id.* at 1372-73.) Finally, *LaSalle Talman Bank* v. *United States* held that "[t]he principle of restitution damages is to return the *costs* incurred in performing the contract" and followed the "resolution" in *Glendale* that "net liabilities . . . do[] not create a *cost* subject to restitution for full cash value." 317 F.3d 1363, 1376-77 (Fed. Cir. 2003) (emphasis added).

[8] The author of the reversed Federal Circuit decision in *Mobil* is also the author of the Federal Circuit's decisions at issue in this petition.

government. See Pet. App. 76a. As the trial court also found, and the Federal Circuit affirmed, the government's repudiation was "a total and material breach" of the contract. *Id.* at 66a; see also *id.* at 30a (referring to the government's breach as a "material breach").

The square holding of *Mobil* is that where, as here, the government commits a material breach, it must give restitution of the plaintiff's cash payments to the government, even if the plaintiff suffered "no damage." 530 U.S. at 623. Yet, remarkably, the Federal Circuit denied Glendale even the return of its $18.24 million cash payments to the government. The only possible reason the Federal Circuit denied restitution of this $18.24 million is its holding that restitution is impermissible if it exceeds reliance damages. *Supra* at 9.

So patent is the conflict between this aspect of the Federal Circuit's decision and *Mobil* that summary reversal on this point is appropriate. At a minimum, certiorari and full briefing is warranted.

3. The Federal Circuit's next improper deviation from contract law was its declaration that, as a matter of law, restitution is simply unavailable against the government when the plaintiff's performance is the assumption of liabilities. It compounded its error in adopting this erroneous rule of law by reviewing the trial court's restitution award *de novo*, when both general contract principles and the rules applied in two other circuits require review only for abuse of discretion.

The Federal Circuit properly concluded that Glendale's performance provided a benefit to the government. Pet. App. 33a-34a (rejecting government's argument that its benefit was "zero" as "flawed"). Thus, the only proper issue remaining was review of the trial court's calculation of the amount of that benefit. Rather than proceed in the fashion required by black-letter contract principles, however, the Federal Circuit held, *as a matter of law*, that the amount of benefit provided by an acquiring thrift's assumption of net liabilities is

"speculative and indeterminate" and therefore that the remedy of restitution was unavailable to Glendale (and other similarly-situated *Winstar* banks) as a matter of law, where it exceeds the plaintiff's out-of-pocket losses. *Id.* at 35a (describing first panel ruling).

The Federal Circuit's decision to treat the amount of restitution as a question of law and review that award *de novo* conflicts with general principles of contract and restitution law. These principles hold that calculation of the amount of restitution is within the discretion of the trial court and is reviewed only for abuse of that discretion. See, *e.g.*, *Restatement (Second) of Contracts* § 371 cmt. a (decision how to measure restitution "is within the discretion of the court"); cf. 5 A. Corbin, *Corbin on Contracts* § 1112, at 596 (1964) ("Doubts and difficulties in the determination of this question of value [for restitution] should be resolved against the [breaching] defendant."). Moreover, as discussed below, the Federal Circuit's chosen standard of review conflicts with that used by the Ninth and Tenth Circuit in reviewing restitution awards in *Winstar* cases. See *infra* Section II. The Federal Circuit's decision to treat restitution as a disfavored remedy whose award is subject to *de novo* review is particularly unfounded, given that it simultaneously (and correctly) held that lost profits and reliance damages are reviewable only under the clearly erroneous rule. Pet. App. 28a, 29a-30a.

Because the Federal Circuit erroneously engaged in *de novo* review of the restitution award, it never addressed whether the trial court's factual findings regarding the nature and amount of benefit conferred by Glendale on the government were clear error or whether its award of restitution constituted an abuse of discretion. Instead, the Federal Circuit substituted its own *de novo* assessments that: (i) a government takeover of Broward *might* not have occurred, (ii) the merged Glendale *might* have failed after the transactions, thereby returning liability for the assumed liabilities to the government, and (iii)

the government *might* have found some other thrift to acquire Broward. Pet App. 34a-35a. Because it used the wrong standard of review, the panel concluded that the only benefit the government received was "time," and that there was "no proof" of the value of this narrow benefit. *Id.*

Under the proper standard of review, however, there was ample proof that the government's benefit was far more significant than "time," and, indeed, there was ample evidence supporting the trial court's determination that the benefit Glendale conferred was $798 million (reduced by an offset for a final award of $510 million). First, the evidence at trial established that Broward was in an irreversible decline and on the brink of a government takeover. See *supra* at 5. Second, the trial evidence, including contemporaneous assessments by the regulators, established that at the time of the Glendale merger the government concluded it was a *permanent* solution to the Broward problem, and that there was no material risk of failure of the combined thrift after the transaction. *See id.* Third, the government also concluded that Glendale was the only willing thrift with sufficient strength to pay Broward's liabilities and that the government's other options would have proven *more* expensive than immediate liquidation. See *supra* n. 2.

Moreover, the Federal Circuit's conclusion that the government *might* have had other options besides inducing Glendale to assume Broward's net liabilities itself creates a conflict. As the Ninth Circuit held in a similar case, the value of the alternatives the government chose not to pursue is legally *irrelevant* to restitution. *Far West Fed. Bank, S.B.* v. *Office of Thrift Supervision-Dir.*, 119 F.3d 1358, 1366 (9th Cir. 1997).

Here, the trial court did not abuse its discretion in basing a restitution award on its well-supported finding that the Glendale merger was a permanent solution to the government's imminent takeover of Broward. This decision would have been affirmed if the Federal Circuit had not

adopted the legal rule that restitution was unavailable to Glendale as a matter of law, and had instead used the abuse-of-discretion standard of review required by generally applicable contract law.

4. The Federal Circuit also disregarded this Court's mandate to follow traditional contract principles when it concluded that, as a matter of law, calculation of any benefit to the government is not measured at the time the benefit was conferred, but instead must take account of subsequent events.

The trial court correctly found that the date of Glendale's performance was November 19, 1981, when Glendale assumed Broward's liabilities. Pet. App. 71a. The trial court measured that benefit *at that time* as the market value of the liabilities assumed minus the market value of the assets acquired. See *id.* Indeed, this amount matched the government's own assessment in 1981 of its benefit from being relieved of liabilities that otherwise immediately would have become its own. *Supra* at 6-7. The Federal Circuit, however, erred in holding that, as a matter of law, assessment of the government's benefit must reflect "subsequent events," specifically declining interest rates *after* November 1981. Pet. App. 33a, 37a.

Mobil makes plain that the primary source to follow in applying general contract rules is the *Restatement (Second) of Contracts*. See, *e.g.*, 530 U.S. at 608, 614, 621, 622, 624. Despite this, the Federal Circuit adopted a special pro-government rule that conflicts with the *Restatement (Second)*, which requires measurement of restitution at the time the benefit is conferred without regard to subsequent events. See, *e.g.*, *Restatement (Second) of Contracts* § 370 cmt. a (restitution "is generally satisfied if a benefit has been conferred, and it is immaterial if it was *later* lost, destroyed or squandered" (emphasis added)); *id.* illus. 3 (explaining that A may get restitution of $100,000 deposited to B's credit in a bank that subsequently fails); 5 Corbin, *supra*, § 1112, at

596.[9] As explained *infra* Section II, the Federal Circuit's decision also conflicts with the Tenth Circuit's treatment of the same question.

Finally, the Federal Circuit's rule would have serious consequences any time the benefit conferred on the government by a private party was something (such as securities or real estate) other than cash. Given that the value of such a benefit will fluctuate over time, a private party whose performance was anything other than paying cash could never be assured that it could recover restitution of the value it provided to the government.

II. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE NINTH AND TENTH CIRCUITS ON REMEDIES IN *WINSTAR* CASES.

In adopting its special, pro-government contract rules, the Federal Circuit also created circuit splits on two fundamental points of contract law applicable to all *Winstar* cases: (i) the availability of restitution as a matter of law; and (ii) whether subsequent events are to be taken into account in calculating a restitution award. Unlike the Federal Circuit, these other courts have heeded this Court's instructions and applied normal contract principles to cases involving government breaches.

First, the Federal Circuit's conclusion that restitution was unavailable to Glendale as a matter of law, See *supra* at 9, squarely conflicts with a decision by the Ninth Circuit affirming a restitution award in a *Winstar* case. See *Far West Fed. Bank, S.B.* v. *Office of Thrift Supervision-Dir.*, 119 F.3d

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[9] Subsequent events are relevant, but only to the calculation of the *offset* for plaintiff's benefits. *Restatement of Restitution* § 157 cmt. c. And it was undisputed, as the trial court found, that the offset calculations by Glendale's expert included *all* reductions in the deficit of Glendale's Florida franchise that the franchise actually received from "interest rate declines" after the merger. Pet. App. 76a.

1358, 1367 (9th Cir. 1997). In that decision, the Ninth Circuit correctly held that "[t]he proper measure of restitution depends on the particular circumstances of a given case" and that it is therefore "*within the trial court's discretion* to determine the measure of restitution that justice requires." *Id.* (emphasis added). Contrary to the Federal Circuit, the Ninth Circuit manifestly makes restitution available in *Winstar* cases (having done so in *Far West*) and reviews trial court restitution awards for abuse of discretion. See *id.*

The Federal Circuit's rule also conflicts with that adopted by the Tenth Circuit in another *Winstar* case. Far from ruling out restitution as a matter of law, that court in *RTC* v. *FSLIC affirmed* a restitution award, holding that "[t]he measure of restitution depends on the circumstances of the case and is within the discretion of the trial court." 25 F.3d 1493, 1505 (10th Cir. 1994), *reh'g denied*, 34 F.3d 982 (10th Cir. 1994).

Second, the Federal Circuit's conclusion that subsequent events should be taken into account in calculating the benefit to the government for purposes of a restitution award also conflicts with the Tenth Circuit's holding in *RTC* v. *FSLIC*, 34 F.3d 982 (10th Cir. 1994). In that case, the government argued that it received no benefit from the contract because the government eventually liquidated the acquired thrift despite the plaintiff's acquisition of it. The Tenth Circuit accused the government of "Monday morning quarterbacking" in making this argument. *Id.* at 984. Relying on the *Restatement (Second) of Contracts*, the Tenth Circuit held that subsequent events were "immaterial" to the government's benefit, since the only relevant inquiry was "an examination of the benefit conferred at the time" the plaintiff performed. *Id.*

III. BECAUSE OF THE VOLUME OF ONGOING *WINSTAR* LITIGATION AND THE HARM CAUSED BY A BIG-CASE EXCEPTION TO THE LEGAL RULES FOR GOVERNMENT CONTRACTS, THIS CASE PRESENTS IMPORTANT ISSUES THAT SHOULD BE ADDRESSED BY THIS COURT.

The remedial questions posed by this case are of ongoing and critical importance, both in the specific context of the 45 remaining *Winstar* cases (involving claims for billions of dollars) and even more so in the general context of the Federal Circuit's government contract jurisprudence.

It is especially necessary that the Federal Circuit's deviation from this Court's precedents be corrected in the context of this case because the circuit court has explicitly treated its *Glendale* decisions as roadmaps for litigation of all remaining *Winstar* cases. This was the first *Winstar* case to go to trial, and in the first panel's decision, the Federal Circuit explicitly took note of its special "precedential value." Pet. App. 23a. The court said that any "factual differences" between *Glendale* and future cases would require only "some fine-tuning of results" because "the guidance given to the trial court in this opinion will assist the court, and the parties, in disposing of the remaining [*Winstar*] cases." *Id.* The Federal Circuit returned to this theme in the second *Glendale* decision. It said that its opinion should permit the 45 remaining *Winstar* cases to be resolved "without further dispute over the theory on which damages may be calculated." *Id.* at 9a. Accordingly, the Federal Circuit has made clear to both subsequent panels and the trial courts that the *Glendale* decisions' anti-restitution discussions are both generally applicable and binding.

The court's errors will have a major impact not only on the remaining *Winstar* cases, but also on all future government contract actions in which private parties seek restitution beyond out-of-pocket reliance damages, something generally

applicable contract law provides but that the Federal Circuit now forbids. More generally, the Federal Circuit's decision below is indicative of a tendency in that court to be overly protective of the government's interests in contract breach cases. Even after *Winstar* and *Mobil*, the Federal Circuit shies away from holding the government "accountable under the common law of contracts" and continues to "protect[] [it] by special rules and presumptions." W. Stanfield Johnson, *Mixed Nuts and Other Humdrum Disputes: Holding the Government Accountable Under the Law of Contracts Between Private Individuals*, 32 Pub. Cont. L.J. 677, 679 (2003).

This approach reflects a deep misconception about the Federal Circuit's role in reviewing government contract disputes. As this Court has made clear in cases like *Mobil*, the Federal Circuit is not supposed to be a guardian of the public fisc, but a neutral arbiter charged with applying generally applicable contract principles when the government violates its agreements.

In any event, use of those general principles would actually benefit the government because they would make the government a "reliable contracting partner" by subjecting it to the normal consequences when it breaches. *Winstar*, 518 U.S. at 883; *id.* at 913 (Breyer, J., concurring) (applying normal contract rules to the government "ensures that [it] is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting.").

Accordingly, this Court has long recognized that the benefits that accrue to the public from requiring the government to abide by its financial contracts far outweigh any short-term gains from permitting the government to escape a contractual obligation or limit available remedies out of financial expediency. See, *e.g.*, *United States* v. *Gibbons*, 109 U.S. 200, 203-04 (1883) (rejecting argument that government implicitly reserved a right to modify obligation,

thus placing the "whole risk of the contingency" on the contractor, because the contractor would have demanded a higher price); *accord United States* v. *Purcell Envelope Co.*, 249 U.S. 313, 318 (1919); *Russell* v. *Sebastian*, 233 U.S. 195, 206 (1914). As this Court put it in *Lynch* v. *United States*, "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." 292 U.S. 571, 580 (1934) (Brandeis, J.); see also *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.")

Despite these time-honored principles and this Court's conclusion in *Winstar* eight years ago that the government must be held liable for its breach, the government has still paid out very little in the *Winstar* cases. See Vanessa Blum, *The S and L Payouts That Never Came: Eight Years After High Court Said Uncle Sam Was on the Hook Over Thrift Crisis, Few Plaintiffs Have Seen Even a Penny*, Legal Times, Feb. 16, 2004, at 1. So difficult has it been to collect (in large part because the Federal Circuit erected special hurdles to remedies) that many *Winstar* plaintiffs have simply abandoned their claims. See *id.* The lesson many potential government contractors will take from this episode is that the government is not obligated to be a "reliable contracting partner" *Winstar*, 518 U.S. at 883, because the courts will not require traditional contract remedies when the government breaches. The Court should grant certiorari to ensure that the benefits of traditional contract rules flow to both the contractors and, in the long run, the government itself.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 03-5136, 03-5139

GLENDALE FEDERAL BANK, FSB,
Plaintiff-Cross Appellant,

v.

UNITED STATES,
Defendant-Appellant.

DECIDED: Aug. 9, 2004.

Before MAYER, Chief Judge, PLAGER, Senior Circuit Judge, and LOURIE, Circuit Judge.

PLAGER, Senior Circuit Judge.

In this Winstar-series case, the United States appeals the award by the Court of Federal Claims, Senior Judge Loren Smith, to Glendale Federal Bank, FSB ("Glendale") of $381 million in "wounded bank" damages; Glendale cross-appeals the trial court's denial of another $527.5 million in reliance damages.[1]

1.

This is the second appeal on the damages question. The first appeal arose after a lengthy trial, which resulted in an award to Glendale of $909 million in restitution and "non-overlapping reliance damages." That trial itself was the result of a remand from an earlier consolidated appeal to this court in which the United States challenged the trial court's

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[1] *Glendale Fed. Bank, FSB v. United States*, 54 Fed. Cl. 8 (2002).

determinations regarding liability. The trial court had held that the Federal Savings and Loan Insurance Corporation ("FSLIC") had entered into regulatory capital contracts with three savings and loan "thrifts," Glendale, Statesman Savings Holding Corp., and Winstar Corp., and that the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"),[2] and the regulations imposed thereafter, had breached those contracts. We affirmed the trial court's liability judgment, *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed.Cir.1995) (en banc), and the United States Supreme Court affirmed ours, *United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).

Liability in favor of the plaintiff thrifts having been established, the case was returned to the trial court for determination of damages owed to plaintiffs. The trial court found for the plaintiff Glendale in the amount of $909 million. The Government again appealed. The appeal was viewed as a test of the difficult issues of measuring damages in what became known as the Winstar cases, of which there were some 120 in the queue. On appeal and after a thorough review of the record and the various damage theories propounded by the parties and employed by the trial court, we concluded that the award of $909 million was not supportable, and vacated the judgment. *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374 (Fed.Cir.2001).

In the course of that first damages trial Glendale had sought "expectancy damages," the kind of damages often associated with lost profits. The trial court rejected that theory, concluding that Glendale's model for expectancy damages in the form of lost profits was implausible. We agreed. The theory did not fit comfortably with the history of these cases in the years following the breach; the problems of

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[2] Pub. L. No. 101-73, 103 Stat. 183.

proof suggested that any award premised on expectancy damages would be too speculative to uphold.

Faced with a situation in which as a general proposition expectancy damages were ruled out, but with a legitimate claim by the thrift for a remedy, the trial court fashioned a restitution remedy based on the assumed risk that Glendale undertook when it acquired the salvaged bank (Broward Savings and Loan, a Florida thrift). The crux of the restitution component was the market value of the liabilities assumed by Glendale at the time of the transaction, which the trial court viewed as the value of the benefit conferred on the Government by Glendale. Glendale placed the proper amount of restitution damages at $798 million; the Government argued the proper amount was zero. The trial court sided with Glendale, and after adjusting the amount for the net gains it calculated Glendale had received from the transaction, awarded $510 million.

In our review we concluded that the restitution theory was basically flawed, because it was based on an assumption that the non-breaching party was entitled to the supposed gains received by the breaching party, when those gains in the context of these cases were both speculative and indeterminate. Accordingly we vacated the trial court's award of $510 million.

Recognizing that any damages award in these cases was necessarily a matter of post hoc reconstruction of a set of facts that may have never actually transpired, we did agree with the trial court that a viable theory on which damages could be based was a reliance theory. The trial court had considered reliance theory as a basis for an award, and had added specific reliance damages of $381 million to the total award granted plaintiff; these were denominated non-overlapping reliance damages, and identified as damages for post-breach events.

We noted that in reliance damages, the critical event is the breach itself. Consequently, damages resulting from that event may be the result of actions before or after the breach. But these damages had to be real, and reasonably ascertainable. We concluded that using reliance theory as the damages measure for the losses sustained by thrifts as a result of the Government's breach in FIRREA would provide a firmer and more rational basis than the alternative theories argued by the parties. We ended our opinion noting the enormous effort and dedication to these cases by Judge Smith, and suggested that much of the extensive record before the court—compiled over 150 days in trial and constituting some 20,000 pages—might lend itself to re-evaluation consistent with the guidance provided. Which leads to the second appeal, now before us.

2.

Following the first appeal on damages and our remand to the trial court for further consideration of the issues, Glendale moved in the trial court for entry of judgment, asking the court to reinstate the post-breach "wounded bank" portion of its earlier opinion and judgment, based on the prior findings of the court. This was the $381 million. Glendale claimed an additional $527 million, which it alleged to be the actual out-of-pocket loss suffered by Glendale in its Florida division. The total, with certain adjustments, was something over $862 million. In response to Glendale's motion, the Government did its numbers, and, surprise, came up with zero.

As noted at the beginning, Judge Smith awarded Glendale the $381 million, representing the previously-determined amount of Glendale's "wounded bank" damages, and other incidental reliance damages. The trial court rejected Glendale's claim for the additional $527 million, ruling that Glendale was not entitled to recover on the remainder of its claim because its reliance model failed to measure the actual losses sustained by it as a result of the Government's breach.

The Government appeals the $381 million award; Glendale cross-appeals the denial of its claim for the additional $527 million.

In response to the trial court's award of $381 million in reliance damages, the Government notes that the Glendale-invented notion of "wounded bank" damages is basically ($335 million of the $381 million) the increase in the cost of funds Glendale allegedly incurred as a result of its having been wounded by the Government's breach. These losses were said to have occurred because three years after, and as a result of, the breach, Glendale fell out of capital compliance; depositors and others became nervous about placing funds with it; the bank was required to pay more interest to attract depositors; and it was required to pay higher fees for deposit insurance.

But, argues the Government, in proving that it would not have fallen out of capital compliance but for the breach, Glendale relied upon the same model it presented in support of its earlier claim for lost profits under the now-discredited expectancy damages theory. According to the Government, since Glendale did not offer any other evidence, it failed to prove that it would have remained in capital compliance in the absence of the breach. The Government offered several other reasons why Glendale's proof on the issue failed, including that the proof regarding what happened three years after the breach was too remote and speculative, it was based on the costs of acquiring the Florida thrift, a cost element that had been rejected by the courts, and in any event Glendale actually benefited, rather than was hurt, by acquiring the Florida thrift.

The trial court was unimpressed with the Government's arguments. With regard to the reinstatement of the "wounded bank" damages, the trial court was of the view that there was nothing in our remand instructions that required the court to revisit its prior findings and award of post-breach reliance

damages. The trial court is correct; indeed, we invited the court to proceed on the basis of the record before it. However denominated, the focus of a recovery based on the reliance interest is the real costs incurred for capital and services that the thrift would not have incurred but for the contract and its subsequent breach. Whether in a given case this properly includes the higher costs to a thrift of conducting its general business after FIRREA—the "wounded bank" claim—is a matter of proof; if too speculative, it can and should be denied as the burden lies with the plaintiff to establish its damages. In the case before us, we are unpersuaded that the trial court's factual findings and conclusions regarding reliance damages, based on the earlier record, are clearly erroneous; the judgment in that regard is fully consistent with the law as we enunciated it. The award of reliance damages in the amount of $381 million is affirmed.

With regard to Glendale's cross-appeal on the operating losses allegedly sustained by Glendale in its Florida venture, the trial court after hearing all the evidence concluded that there was a failure of proof: "plaintiff has failed to persuade the court that its reliance damage model shows any 'actual losses sustained by plaintiff as a result of the Government's breach.'" 54 Fed.Cl. at 13 (quoting *Glendale*, 239 F.3d at 1383). The court explained with some care why that was so, including an extensive review of the report of plaintiff's expert witness, which, in the court's judgment, reflected an absence of an accurate accounting of the actual losses. The court went on to note that the framework for the calculation of reliance damages as articulated by the Federal Circuit focuses on actual out-of-pocket losses, not paper calculations of losses, and that much of Broward's paper deficit was eliminated by the reduction in interest rates.

These are factual assessments by the trial court based on a thorough review of the record and long-familiarity with the evidence, much of which related to a complex series of events occurring many years before. We are not inclined, indeed, it

would be highly speculative for us on the limited record we have before us, to second-guess the court's determinations in this regard. Put in the traditional language of judicial review, we again are unpersuaded that there has been a showing of clear error by the trial court. The denial of Glendale's claim for additional damages is affirmed.

Finally, the Government as its ultimate fallback argues that, even if Glendale is entitled to reliance/"wounded bank" damages of $381 million, the Government is entitled to an offset of $243 million. This is an amount that Glendale incorporated as a gain to Glendale in its accounting for losses when it sold the Florida division, resulting in the net claim of $527 million. That claim of course was denied by the trial court, a denial which we have affirmed. Nevertheless, the Government argues that since Glendale acknowledged this amount in its calculation of net losses, it should be required to deduct it from its claim for reliance damages.

Glendale responds that the burden is on the Government to prove the offset, and that to prove an offset against the awarded reliance damages the Government would have to show that Glendale received a net benefit from its Florida franchise. We agree that Glendale's calculation of its denied claim for losses regarding the Florida division is not determinative of its other operational losses as a result of the breach. The trial court did not deduct the $243 million from its final award to Glendale, and we see no reason that we should do so.

In sum. A large part of the problem with which the trial court has had to wrestle has been finding a viable damages theory that fits the complex fact patterns of these cases, one that is fair to the damaged thrifts, but is based on real losses sustained so as not to overcompensate for the breach. The overall liability context of contract and breach in these cases is well established by the earlier litigation and appeals in this court and in the Supreme Court. Regarding the damages to

be awarded, it was anticipated—and has proved to be the case—that the specific documentary and evidentiary bases on which damages would be based would vary from case to case.

Expectancy damages theory, based on lost profits, has proven itself impractical for these cases, and generally not susceptible to reasonable proof. We have not, however, barred as a matter of law the use of expectancy/lost profits theory, *see Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1350 (Fed.Cir.2001), but, given the speculative nature of such a damages claim, one that has yet to be successfully established in any Winstar case, *see, e.g., Cal. Fed. Bank v. United States*, 54 Fed. Cl. 704 (2002) (remand), experience suggests that it is largely a waste of time and effort to attempt to prove such damages.[3]

Restitution as a generalized theory for recovery of assumed benefits to the Government, based on non-provable paper costs, has been rejected as explained above. *See LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1376-77 (Fed.Cir.2003). On the other hand, we have allowed restitution for the limited purpose of returning the acquiring thrift to the status quo ante when specific initial contributions to an acquired thrift have been established. *See Landmark Land Co. v. FDIC*, 256 F.3d 1365 (Fed.Cir.2001). In *LaSalle*, we recognized that when restitution damages are based on recovery of the expenditures of the non-breaching party in performance of the contract, the award can be viewed as a form of reliance damages. 317 F.3d at 1376.

Reliance damages, however, are supportable when based on actual losses that are fully proven. "Reliance is an ideal recovery in Winstar cases. Despite the landscape where alternative forms of recovery are speculative and loss models inherently unreliable, reliance damages can be ascertainable

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[3] *See* Jon W. Burd, *Where The Rabbit Hole Ends: A Working Model For Measuring Winstar-Type Damages In The Federal Circuit*, 13 Fed. Cir. B.J. 657 (2004).

and fixed."[4] Proof of reliance damages are factual determinations to be made by the trial court on the basis of the evidence presented by the plaintiff thrifts. Given the complexities of reconstructing the transactions and their consequences, absent a compelling showing of clear error, that should be the end of the matter.

We have noted that "'[i]f a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery,' and the court's duty is to 'make a fair and reasonable approximation of damages.'" *Bluebonnet Sav. Bank, FSB v. United States*, 266 F.3d 1348, 1356-57 (Fed.Cir.2001) (quoting *Locke v. United States,* 151 Ct.Cl. 262, 283 F.2d 521, 524 (1960)). The Government indicates that there remain some forty-five Winstar cases in the Court of Federal Claims awaiting decision. Optimistically, in our first remand on the damages issue we noted: "Though factual differences may require some fine-tuning of results, we expect that the guidance given to the trial court in this opinion will assist the court, and the parties, in disposing of the remaining cases as well." *Glendale*, 239 F.3d at 1376.

We remain optimistic that with the additional guidance and support given the trial court in this opinion the remainder of the Winstar cases can be disposed of either by settlement or by trial based on the particular facts of the case, and without further dispute over the theory on which damages may be calculated. It would benefit the thrifts and the Government, since it is not in the interest of either to have endless litigation, for both to stop arguing extreme positions and promptly resolve these cases in a fair and even-handed manner.

CONCLUSION

The judgment of the trial court is

AFFIRMED.

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[4] Burd, *supra*, at 685.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-772C

GLENDALE FEDERAL BANK, FSB,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Aug. 2, 2002

OPINION

SMITH, *Senior Judge*:

This case is before the court after remand from the United States Court of Appeals for the Federal Circuit and upon the motion of plaintiff Glendale Federal Bank, FSB, for entry of judgment. In *Glendale Federal Bank, FSB v. United States,* 239 F.3d 1374, 1383-84 (Fed.Cir.2001), the Federal Circuit vacated this court's prior award of damages based on restitution and remanded the case to this court for a calculation of plaintiff's total reliance damages, concluding that "reliance damages provide a firmer and more rational basis than the alternative theories argued by the parties." *Id.* at 1383. Upon remand, plaintiff promptly moved for entry of judgment pursuant to Rules 52 and 58 of the Court of Federal Claims in the amount of $862,777,000, which plaintiff contends is the amount of the actual, out-of-pocket losses sustained as a result of Glendale's reliance on the contract. Defendant opposes plaintiff's motion, and contends that Glendale's reliance damages claim is legally barred and that,

even if not legally barred, it is legally and factually infirm in its entirety. Defendant contends that plaintiff's reliance damages are zero.

Plaintiff's motion for entry of judgment relied on the record developed during the trial on damages, which culminated in this court's first opinion on damages. *See Glendale Federal Bank, FSB v. United States,* 43 Fed.Cl. 390 (1999). The court held oral argument on plaintiff's motion on June 26, 2001. The briefing on the motion, as well as the argument, were extraordinarily helpful to the court in formulating this opinion, and the court commends the parties on their written and oral presentations. After careful consideration of the parties' arguments, and after careful review of the relevant legal standards, the factual record developed at trial, and the instructions of the Federal Circuit, the court awards plaintiff Glendale Federal Bank $380,787,000, which represents the total amount of Glendale's "wounded bank" damages, and other incidental reliance damages, which this court concluded in the earlier trial opinion that Glendale suffered as a result of its reliance on the contract. Plaintiff is not entitled to recover on the remainder of its claim, because plaintiff's reliance damage model fails to measure the "actual losses sustained by plaintiff as a result of the Government's breach." *Glendale,* 239 F.3d at 1383. Assuming that plaintiff cannot obtain interest on this amount, this award is unjust in that plaintiff has lost the interest value of this money for a period of many years. Plaintiff will get significantly less than half of the amount that this court feels is the fair amount by which it has been damaged. This is not justice. However, it is not the job of a court to legislate on what the law should say. Rather, the judge must remain true to his oath by following the law.

BACKGROUND

The factual record in this case, both during the liability and damage portions of the proceedings, has been well-

developed. It has also been extensively recounted, in the opinions of this court, the Federal Circuit, and the United States Supreme Court.[1] The following is therefore intended as a summary of the underlying contract and breach, in order to provide a context for understanding the damages claims currently before the court.

Glendale seeks damages resulting from its 1981 supervisory acquisition of a failing Florida thrift, First Federal Savings and Loan Association of Broward County (Broward). Pursuant to its contract with the government, Glendale was permitted to book Broward's net excess liabilities (or negative net worth) as an asset for regulatory capital purposes, and was permitted to amortize this asset, known as supervisory goodwill, over a period of 40 years. Had Glendale not been able to treat the supervisory goodwill as regulatory capital, it would have been immediately insolvent upon consummation of the transaction, with a capital deficit of nearly $500 million. As this court stated previously: "the supervisory goodwill and the long amortization was designed to fill the capital hole, permit Glendale to maintain its ability to leverage its existing capital, give the thrift the ability to generate income to replace the amortizing goodwill and, ultimately, make the whole enterprise profitable." *Glendale,* 43 Fed.Cl. at 394.

In 1989, in response to the increasingly dire systemic crisis facing the savings and loan industry, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). Pub.L. No. 101-73, 103 Stat. 183. FIRREA, among other things, greatly restricted the use of goodwill and

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[1] The case has been the subject of six trial and appellate court decisions. For a more comprehensive discussion of the underlying contract and breach, see, *inter alia, Statesman Savings Holding Corp. v. United States,* 26 Cl.Ct. 904 (1992); *Winstar Corp. v. United States,* 64 F.3d 1531 (Fed.Cir.1995) (*en banc*); and *United States v. Winstar,* 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).

other intangible assets in the calculation of regulatory capital. FIRREA and its implementing regulations breached the goodwill promise. Plaintiff ultimately shrank by approximately 40 percent after the breach, in an effort to improve its capital position. The thrift was ultimately able to raise $451 million in 1993 to return to capital compliance.

At trial, Glendale sought to prove its entitlement to expectancy, restitution and reliance damages. This court concluded that plaintiff's model for expectancy damages in the form of lost profits was implausible, and instead awarded Glendale $908,948,000 in restitution and non-overlapping reliance damages. *Glendale,* 43 Fed.Cl. at 399, 410. The crux of the restitution component was the market value of the liabilities assumed by Glendale at the time of the transaction, which the trial court viewed as the value of the benefit conferred upon the government by Glendale. *Id.* at 406-07. Once the net gains for Glendale from the transaction were deducted, this trial court concluded that the net benefit conferred on the government was $509,921,000. *Id.* at 409. This court also awarded $380,787,000 in non-overlapping, or post-breach, reliance damages. The largest component of this portion of the damage award are "wounded bank damages," which reflect the increase in the cost of funds which Glendale suffered as a result of falling out of capital compliance after the breach. *Id.* at 408-09.

On appeal, the Federal Circuit rejected this court's restitutionary award based on the market value of the assumed liabilities of Broward. The Federal Circuit stated that "it is clear that the Government's promise that was breached had substantial value." *Glendale,* 239 F.3d at 1381-82. However, the Federal Circuit stated:

> [T]he action taken by the purchasing S & L in acquiring the failing thrift did not result in the Government, specifically the FSLIC, saving the dollar value of the net obligations of the thrift. For one, it is not at all clear that

> but for Glendale's purchase of Broward the Government would have been called upon to make up that deficit then and there. Glendale was only one of a number of potential acquirers of Broward. Alternatively, rather than approve a merger, the Government had open to it the option of hiring new and better management to run Broward and make a go of it, just as Glendale itself did.

Id. at 1382. Ultimately, the Federal Circuit concluded that the value of the assumed liabilities in this context does not represent an accurate calculation of the benefit received by the government:

> This case, then, presents an illustration of the problem of granting restitution based on an assumption that the non-breaching party is entitled to the supposed gains received by the breaching party, when those gains are both speculative and indeterminate. We do not see how the restitution award granted by the trial court, measured in terms of a liability that never came to pass, and based on a speculative assessment of what might have been, can be upheld; accordingly, we vacate the trial court's damage award on this theory.

Id.

The Federal Circuit remanded the case for a calculation of reliance damages. The Federal Circuit stated:

> [W]e conclude that, for purposes of measuring the losses sustained by Glendale as a result of the Government's breach, reliance damages provide a firmer and more rational basis than the alternative theories argued by the parties. . . . Reliance damages will permit a more finely tuned calculation of the actual losses sustained by plaintiff as a result of the Government's breach.

Id. at 1383. In addition, because the case was being remanded to the trial court, the Federal Circuit elected not to review the reliance components of the court's award at that time, electing to "await the final award review when and if it is appealed." *Id.* at 1384.

ANALYSIS

A parties' reliance interest is "his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made. . . ." Restatement (Second) of Contracts § 344(b). The principle in reliance damages, according to the Federal Circuit, "is that a party who relies on another party's promise made binding through contract is entitled to damages for any losses actually sustained as a result of the breach of that promise." *Glendale,* 239 F.3d at 1382. In addition, the Federal Circuit has stated that "[a]s a general proposition, these damages are available for injuries resulting from activities that occurred either before or after the breach." *Id.* at 1383 (citing Calamari & Perillo, The Law of Contracts § 14.9 ("[A] party may recover expenses of preparation of part performance, as well as other foreseeable expenses incurred in reliance upon the contract.")))

In its motion for entry of judgment, Glendale asks the court to reinstate the post-breach "wounded bank" portion of its earlier opinion and judgment, including the prior findings of the court. Plaintiff argues also that it is entitled to recover, as reliance damages, all post-acquisition expenses that Glendale reasonably and foreseeably incurred in reliance on the government's promise and which it was unable to recoup further after the government's breach of the contract, despite reasonable mitigation efforts, less all income Glendale realized from the Florida division. According to plaintiff's experts, the net actual out-of-pocket loss suffered by Glendale in its Florida division was $527,530,000. When coupled with the $380,787,000 wounded bank damages, plaintiff seeks to have reinstated, and less $45,540,000 in losses already counted as wounded bank damages, plaintiff seeks a total reliance damage award of $862,777,000. This reliance award which plaintiff seeks now is identical to the reliance award plaintiff sought to prove at trial.

Glendale's Out-of-Pocket Loss on the Florida Division

Glendale argues that it is entitled to recover all its out-of-pocket cash losses that it suffered in operating the Florida division. Glendale contends, first, that its out-of-pocket cash loss was the reasonable and foreseeable result of Glendale's reliance on the contract. According to Glendale:

> The record establishes that Glendale's management of its Florida division from 1981-1994 [when Broward's deposits were sold] was entirely reasonable, and that its specific decisions to sell Broward's long-term, fixed-rate mortgages, diversify its portfolio to reduce the interest-rate mismatch that precipitated Broward's failure, and expand its operations in Florida were not only foreseeable but made with the government's knowledge and active encouragement.

Glendale's Br. for Entry of J. at 10. Therefore, according to Glendale, it is entitled to reliance damages based on alleged losses it suffered as part of its long-term operation of Broward, and which it was unable to recoup because of the breach.

Second, Glendale argues that it has accurately tabulated its net out-of-pocket cash losses from the operation of the Florida franchise. According to Glendale, its experts have established that Glendale sustained an out-of-pocket cash loss of $527,300,000. This amount, according to plaintiff, represents the actual loss suffered by Glendale by "simply adding up *all* of the Florida liabilities Glendale *paid* through 1994 and then deducting from this sum *all* of the income and asset value it realized in Florida through 1994." Glendale's Br. for Entry of J. at 23.

Defendant makes a multi-pronged attack on plaintiff's claim for reliance damages based on its alleged Florida operating losses. First, defendant argues that the entire claim for the Florida operating losses is barred as a matter of law because these losses are not in fact reliance damages. They

are neither "essential" reliance damages—that is, expenditures that plaintiff has incurred in partially performing or preparing to perform a breached contract. Nor are they "incidental" reliance damages. Defendant characterizes these as expenditures made in preparation for a collateral transaction with the expectation that the performance of the breaching party will allow recoupment of that expenditure, with that expenditure now rendered worthless by the breach. Further, the government argues that allowing plaintiff to recover the Florida operating losses would render the government the guarantor against plaintiff's losses, and nowhere in the actual goodwill contract does the government provide such a guarantee. Defendant then argues that, even were the Florida operating losses to be considered reliance costs, Glendale cannot recover them because it cannot show that it would have recouped the alleged losses absent the breach. Regardless, according to defendant, the breach did not require plaintiff to sell Florida, so the breach did not prevent the recoupment because it did not force the sale of Florida, and even if it did force the sale, Glendale received fair value for the franchise as part of the sale.

Defendant also takes plaintiff to task on the calculation of plaintiff's alleged out-of-pocket losses. First, and principally, defendant argues that the basis of plaintiff's calculation of its losses is barred as a matter of law. That is because, contrary to plaintiff's contention, the calculation is really premised on treating the value of the net assumed liabilities as the cost, or initial investment, which Glendale paid for the Florida franchise. Defendant poses the following syllogism to explain its argument: "(1) The Federal Circuit held that Glendale did not pay Broward's excess liabilities. (2) Glendale's claim for [Florida operating losses] turns upon the assumption that Glendale did pay Broward's excess liabilities. (3) This Court must reject Glendale's claim for [Florida operating losses]." Br. of the United States Re. Glendale's Failure to Prove Reliance Damages at 45. In addition, defendant makes

several methodological attacks on the composition of Glendale's alleged profits and losses from the operation of Florida.

Although the parties spend considerable time in the briefs arguing over whether Glendale's alleged Florida operating losses are reliance damages under the Federal Circuit's articulation of the scope of the reliance interest, in the end it is does not matter, because plaintiff has failed to persuade the court that its reliance damage model shows any "actual losses sustained by plaintiff as a result of the Government's breach." *Glendale,* 239 F.3d at 1383. Because plaintiff's model does not show any "actual losses," the court need not answer whether the government is responsible for any losses.

The bottom line is that plaintiff's model for calculation of Florida losses relies on treating the assumption of Broward's liabilities as a cost, or initial investment. The report provided by Brad S. Plantiko, plaintiff's accounting expert, makes this unambiguously clear:

> To determine the Pre-Tax Net Recovery to Glendale of its Florida operation, Peat Marwick determined the amount of Glendale's investment in Florida. The amount of Glendale's investment in Florida *is equal to the fair value of the liabilities assumed by Glendale minus the fair value of the assets acquired by Glendale, i.e., the goodwill that Glendale obtained on its books as a result of its acquisition of Broward and other Florida acquisitions.*

(Emphasis added). The Federal Circuit, however, has concluded, based on the facts of the case, that "*neither Glendale* nor the Government was called upon to pay the potential losses the fear of which was the motivation for the scenario in the first place." *Glendale,* 239 F.3d at 1382 (emphasis added). And, as this court stated in its prior opinion on damages, a critical failing of plaintiff's model is that "it does not show that [Glendale] actually had to expend this amount in reliance on the contract." *Glendale,* 43 Fed.Cl. at 403.

Plaintiff's attempts to get around this holding and the Federal Circuit's focus on "actual losses" are simply unavailing. Glendale contends that it is unnecessary to determine whether the assumption of liabilities constituted a real cost at the time of the merger, because over time Glendale paid cash on its liabilities. Further, plaintiff points to a footnote to Mr. Plantiko's report, which plaintiff argues makes the point that Mr. Plantiko's calculation of Glendale's Florida loss "would be unchanged" if the goodwill was not treated as a cost or investment, provided that it was also not given value as an asset. But, as defendant points out, this footnote does not render the goodwill amount irrelevant to the calculations, but merely states that the results of the analysis would be unchanged whether he treated Broward's goodwill as an actual cost incurred on the day of the merger or an actual cost incurred over the amortization period. It does nothing to alter the reality that Mr. Plantiko's analysis is premised on treating the initial supervisory goodwill figure—that is, the mark-to-market value of Broward's excess liabilities—as Glendale's principle cost or investment.

The central point is that Mr. Plantiko's report does not offer an accurate accounting of the actual losses Glendale sustained in operating the Florida franchise. Stated differently, it does not serve as an accurate measure of the total amount of cash spent in Florida, less the total amount of cash received in operating Florida. Rather, it measures the market value of the assumed liabilities as a cost, but does not answer the question of whether Glendale was called upon to pay a net cash outlay in the amount of the assumed excess liabilities. The court is cognizant of the cases cited by plaintiff that hold that a contractually-binding assumption of a debt not yet due is a cost for purposes of contract damages. But the court is also aware that the framework for the calculation of reliance damages as articulated by the Federal Circuit focuses on actual out-of-pocket losses, not paper calculations of losses, and that much of Broward's paper deficit was eliminated by

the reduction in interest rates. If this were a dispute between two private parties the plaintiff's argument would have greater force. But the law of the case on this point is clear: plaintiff's assumption of Broward's deficit was not a cost.

As plaintiff points out, it paid all liabilities as they came due, in cash. The problem is that plaintiff's model does not measure that figure, in cash. It is predicated on a liability figure that the Federal Circuit has found "never came to pass" and is speculative. Because of these infirmities, and because it cannot serve as the basis for an accurate accounting of plaintiff's Florida losses, the court is compelled to deny plaintiff's motion for damages caused by the Florida operating losses in their entirety.

Glendale's Wounded Bank and Other Post-Breach Reliance Damages

In its motion, Glendale does not reargue its case for these damages, but merely requests that the court reinstate its award and findings in support thereof. Defendant devoted considerable time in its response to attacking the case for wounded bank damages, and plaintiff was obliged to respond in its reply brief, although it maintained that the court need not address the issue and should reinstate the prior award.

Although the court is mindful that the Federal Circuit has not addressed the merits of this portion of the court's damage award, the court also believes that there is nothing in the Federal Circuit's decision which requires that the court revisit its prior findings and award on the wounded bank and other post-breach reliance damages. Additionally, the court believes that these damages meet the criteria that the Federal Circuit has laid out: they are actual, ascertainable damages suffered by plaintiff as a result of the breach. The court therefore reinstates its prior reliance award of $380,787,000.

CONCLUSION

For the reasons stated above, the court grants plaintiff's motion for entry of judgment in part to reinstate the court's prior award of reliance damages in the amount of $380,787,000. The court denies the motion for entry of judgment with respect to that portion of reliance damages resulting from the alleged Florida operating losses. The Clerk is therefore directed to enter judgment for plaintiff in the amount of $380,787,000.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 99-5103, 99-5113.

GLENDALE FEDERAL BANK, FSB,
Plaintiff-Cross Appellant,

v.

UNITED STATES,
Defendant-Appellant.

Feb. 16, 2001

Before MAYER, Chief Judge, PLAGER, Senior Circuit Judge,* and LINN, Circuit Judge.

PLAGER, Senior Circuit Judge.

The issue in this case is how to measure the damages sustained by savings and loan institutions as a result of the breach by the United States of contracts it made with these organizations during the savings and loan crisis of the late 1970s and early 1980s. In *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed.Cir.1995), this court upheld the judgment of the Court of Federal Claims holding the United States liable for breach of contract as a consequence of the enactment of the Financial Institutions Recovery, Reform and Enforcement Act. The judgment of this court was affirmed by the Supreme Court, *United States v. Winstar Corp.*, 518 U.S. 839, 116

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* Judge Plager assumed senior status on November 30, 2000.

S.Ct. 2432, 135 L.Ed.2d 964 (1996), and the matter was remanded to the Court of Federal Claims for a trial on damages.

The trial in this case, the first of more than 120 *Winstar*-related cases, ultimately took more than 150 days conducted over a period of fourteen months, and produced more than 20,000 pages of trial transcript. The trial court made a conscious decision that the trial in this case would serve to air and test many of the models and theories at issue in most of the other cases. We have the benefit of a carefully reasoned and extensive opinion from the trial judge.

Though we decide only the case before us, we too are sensitive to the precedential value of the decision in this case. For that reason we have considered carefully the arguments of both parties, as well as those of the several amici. Though factual differences may require some fine-tuning of results, we expect that the guidance given to the trial court in this opinion will assist the court, and the parties, in disposing of the remaining cases as well.

On April 12, 1999, the trial court entered a judgment awarding plaintiff Glendale Federal Bank, FSB ("Glendale") $908,948,000 in restitution and non-overlapping reliance damages for the breach of contract, and denying the Government's motion for summary judgment based on a special plea of fraud. The Government appeals the trial court's judgment. Glendale cross-appeals, stating that, should we reverse the award of restitution damages, it is entitled to additional reliance damages which were denied it because they overlapped the trial court's grant of restitution.

We conclude that the trial court properly resolved the issue regarding the fraud plea. However, because we see the question of the proper damages theory somewhat differently,

we vacate the trial court's damages award and remand the case with instructions for further proceedings consistent with this opinion.

BACKGROUND

We provide a brief background of the case for completeness and to provide the setting for the decision to follow. Much may already be familiar to the reader; the facts regarding the crisis that generally affected the savings and loan industry, and that led up to the formation and breach of the contract between Glendale and the Government, are covered extensively in prior opinions of this court, the Court of Federal Claims, and the United States Supreme Court.[1]

The Federal Savings and Loan Insurance Corporation ("FSLIC")[2] was established by Congress to insure the deposits of savings and loan institutions (also known as "S & Ls" or "thrifts"), and the Federal Home Loan Bank Board ("FHLBB")[3] was established to safeguard the soundness of those institutions. Pursuant to this regulatory scheme, thrifts that desired to provide depositors with the insurance guaranteed under the program were required to maintain a certain level of capital.

Interest rates soared during the late 1970s and early 1980s, causing the savings and loan industry serious economic problems. At that time, thrifts' liabilities were principally short-term deposits, while their assets were primarily long-

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[1] *See United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996); *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed.Cir.1995); *Statesman Sav. Holding Corp. v. United States*, 26 Cl.Ct. 904 (1992); *Winstar Corp. v. United States*, 25 Cl.Ct. 541 (1992); *Winstar Corp. v. United States*, 21 Cl.Ct. 112 (1990).

[2] Ch. 847, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750g (1988)).

[3] Ch. 64, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461-1468 (1988)).

term fixed-rate mortgages. When interest rates soared, the value of the long-term fixed-rate assets plummeted, and the thrifts had to pay higher rates on their liabilities. As a result, many thrifts experienced difficulty remaining solvent and many became insolvent.

The Government's insurance fund lacked sufficient funds to liquidate even a small percentage of the thrifts that became insolvent. Consequently, the FSLIC and the FHLBB began to consider proposals for outside investors and thrifts to acquire other thrifts through mergers to prevent an exhaustion of the insurance fund.

Mergers were attractive to solvent thrifts because they enabled the thrifts to acquire previously prohibited interstate branches, to acquire high-quality assets that suffered only from the current interest rate squeeze, and to transform an insolvent thrift's net liabilities into an intangible asset called "supervisory goodwill." "Supervisory goodwill" was the accounting term for the difference between the market value of the acquired entity's liabilities and the market value of the acquired entity's assets. This difference was conceived of as part of the cost to the acquiring thrift. The accounting device was important to the acquiring thrift because the FHLBB allowed thrifts to include supervisory goodwill in the calculation of its regulatory capital requirements. Further, regulators in some instances would permit the goodwill to be amortized over a period of forty years.

In 1981, the Government and Glendale, an S & L institution primarily doing business in California, entered into negotiations concerning Glendale's possible acquisition of First Federal Savings and Loan Association of Broward County, Florida ("Broward"). The FHLBB found that Broward's financial condition was deteriorating and projected that Broward's regulatory capital would fall to zero by June 1982. Although Glendale was also losing money, the federal regulators determined that Glendale was nevertheless a

financially strong institution, had no material management problems, and had the strength to absorb Broward and remain viable for some years.

In November 1981, the FHLBB approved Glendale's acquisition of Broward in a voluntary merger, and the Government and Glendale entered into a contract memorializing the arrangement. At the time of the merger, the market value of the liabilities of Broward exceeded the market value of its assets by $734 million. Pursuant to its contract with the Government, Glendale was permitted to book Broward's resulting market value deficit or net excess liabilities (negative net worth) as supervisory goodwill, an asset for purposes of meeting regulatory capital requirements. This supervisory goodwill was to be amortized over forty years, or until 2021.

Not long after the merger, interest rates declined, and the asset squeeze experienced by the industry eased. For a variety of reasons, some in the Government began to doubt the wisdom of the contracts that had been made with the salvaging S & Ls. In August of 1989, Congress enacted the Financial Institutions Recovery, Reform and Enforcement Act ("FIRREA"). FIRREA, among other things, greatly restricted the use of goodwill and other intangible assets in the calculation of regulatory capital.

Beyond that, FIRREA and its implementing regulations repudiated the Government's obligation to recognize Glendale's goodwill as an asset for purposes of regulatory capital over the contract's forty-year amortization period by requiring Glendale to deduct goodwill in determining its regulatory capital on a greatly accelerated schedule. In addition to mandating the phase-out of goodwill as an asset includable in calculating a thrift's regulatory capital ratios, FIRREA and its implementing regulations also changed the minimum requirements for capital.

A thrift, such as Glendale, that depended on supervisory goodwill to meet the new capital requirement could either: 1) increase its capital-to-assets ratio through retained earnings; or 2) increase its capital-to-assets ratio by reducing the size of the institution or by raising capital. When FIRREA was enacted, Glendale carried $536 million on its books in supervisory goodwill from its acquisition of Broward. In response to the phase-out of goodwill, Glendale reduced its size from $25.6 billion in total assets to $14.4 billion and, in 1990, ceased most high credit-risk lending. Although shrinking reduced its losses, Glendale nonetheless failed the risk-based capital requirement in March of 1992 and the core capital requirement in December 1992.

To return to compliance, in 1993 Glendale raised $451 million from new investors. Glendale incurred $24.2 million in transaction costs in this recapitalization. In 1994, Glendale sold its Florida Division, including Broward. In 1995, Glendale sold University Savings, its Washington subsidiary. In 1998, Glendale merged with California Federal Bank.

PROCEDURAL HISTORY

Glendale brought this action claiming the enactment of FIRREA breached an agreement by the Government to give Glendale favorable regulatory treatment in connection with its merger with Broward. As noted, the courts that reviewed the matter held that FIRREA's enactment rendered the Government liable to Glendale for breach of contract; the matter was remanded to the trial court for a trial on damages.

The trial court: 1) denied the Government's motion for summary judgment which raised a special plea in fraud, based on 28 U.S.C. § 2514 (1994); 2) denied Glendale's claim for expectancy damages because it was speculative and not proven to a reasonable certainty; 3) awarded Glendale $509,921,000 in restitution damages, which was the amount by which Broward's liabilities exceeded its assets on the date

of the merger, less the value of the benefits Glendale received from the contract; 4) awarded Glendale $18,400,000 in restitution damages, which was the amount that Glendale paid to the Government under the interest shifting provision of the contract; 5) denied Glendale's restitution claim for interest earned on the assets of the FSLIC fund in the amount of $1.11 billion; 6) found that Glendale was entitled to $380,787,000 in non-overlapping (post-breach) reliance damages; and 7) denied Glendale's claim for reliance damages which overlapped with its restitution award.

The Government has appealed the trial court's denial of its summary judgment motion based on a special plea in fraud, the trial court's award of restitution damages, and its award of non-overlapping reliance damages. Glendale has conditionally cross-appealed the trial court's denial of reliance damages which overlap with the restitution award; should this Court reverse the trial court's award of restitution damages, Glendale claims the benefit of the denied damages. Glendale has not appealed the trial court's denial of Glendale's claim for expectancy damages and restitution damages for the interest earned on the assets of the FSLIC fund in the amount of $1.11 billion.

STANDARD OF REVIEW

The trial court's legal conclusions are reviewed independently. *Hendler v. United States*, 175 F.3d 1374, 1378-79 (Fed.Cir.1999). Findings of fact are subject to the clearly erroneous standard. *Id.* at 1378.

DISCUSSION

I.

First, we will briefly dispose of an issue raised by the Government. The Government has appealed the trial court's denial of its motion for summary judgment based on a special plea in fraud under 28 U.S.C. § 2514 (1994). That statute

provides, "[a] claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof." 28 U.S.C. § 2514 (1994). This court has explained that "[t]o prevail under [28 U.S.C. § 2514], the government is required to establish by clear and convincing evidence that the contractor knew that its submitted claims were false, and that it intended to defraud the government by submitting those claims." *Commercial Contractors, Inc. v. United States,* 154 F.3d 1357, 1362 (Fed.Cir.1998) (emphasis added).

The Government argues that Glendale's suit is an effort to defraud the Government. The Government's claim is based upon conflicting statements made by two Glendale officers concerning Glendale's business intentions. Their statements made earlier in this protracted litigation conflict with statements they made more recently in support of Glendale's damages theories.

Though the trial court styled its resolution of this question as a denial of a motion for summary judgment, it is clear from the treatment of the issue in the trial court's opinion that the matter was fully considered at trial. Accordingly, because the question of whether the conflict in the testimonies evidences an intent by Glendale to defraud the Government is a question of fact, we review the trial court's findings under the clearly erroneous standard. The trial court considered the Government's arguments concerning the conflicting statements in its discussion and rejection of Glendale's claim for expectancy damages. *Glendale Fed. Bank v. United States,* 43 Fed. Cl. 390, 400 (1999). After examining and hearing the evidence, and observing Glendale's employees and their demeanor, the trial court found that the statements "do not rise to the level of a showing of fraud . . . ." *Id.* The trial court reasoned that while the statements were inconsistent, "[t]his does not

mean fraud occurred, but rather more likely, that Glendale [officials] cannot help but think about what [they] would have done with the benefit of hindsight [and i]t also means that post hoc reconstructions of this sort are likely to be colored by knowledge of what actually happened . . . ." *Id.* The trial court's findings are not clearly erroneous and the trial court's resolution of the issue is affirmed.

II.

The primary issue in this case is damages, how much and why. A review of basic principles of contract law and damages will illuminate the issues and their resolution.

Much of law and legal liability turns on fault, on the notion of wrong-doing, and of providing retribution for and discouraging such conduct. Contract law, and the consequences of breach of contract, do not. When parties enter into a contract, and promise each other that they will perform in accordance with the terms of their agreement, they retain a choice: when the time comes they can perform, and accept whatever benefits and losses the contract gives them, or they can refuse to perform and pay the consequences. The consequences the law imposes are for the purpose of making the non-breaching party whole, not for the purpose of punishment, or retribution, or deterrence. (Throughout this discussion we are assuming that the breach involved is a material breach, as it is in the case before us.)

One way the law makes the non-breaching party whole is to give him the benefits he expected to receive had the breach not occurred. *See Restatement (Second) of Contracts* § 344(a) (1981). The benefits that were expected from the contract, "expectancy damages," are often equated with lost profits, although they can include other damage elements as well. *See Restatement (Second) of Contracts* § 347. The problems of proof attendant on the burden placed on the non-breaching party of establishing lost profits—on establishing

what might have been—are well recognized. Even with a generous standard of proof applied in such cases, *see, e.g., San Carlos Irrigation & Drainage Dist. v. United States*, 111 F.3d 1557, 1563 (Fed.Cir.1997); *Neely v. United States*, 152 Ct.Cl. 137, 285 F.2d 438, 443 (1961), the proof problems can in some situations prove to be insurmountable.

In the case at hand, Glendale sought expectancy damages; the trial court concluded that on the facts of the case Glendale was not entitled to expectancy damages. This conclusion appears to rest upon problems of proof, coupled with certain evidentiary issues related to inconsistent positions taken at different stages of the litigation by Glendale's key witnesses. In this appeal, Glendale does not challenge that ruling by the trial court.

When proof of expectancy damages fails, the law provides a fall-back position for the injured party—he can sue for restitution.[4] The idea behind restitution is to restore—that is, to restore the non-breaching party to the position he would have been in had there never been a contract to breach. *See Acme Process Equip. Co. v. United States,* 171 Ct.Cl. 324, 347 F.2d 509, 528 (1965); *Far West Fed. Bank, S.B. v. Trinity Ventures, Ltd.,* 119 F.3d 1358, 1367 (9th Cir.1997); *In re First Penn Corp.,* 793 F.2d 270, 272 (10th Cir.1986) ("The object of restitution is to return the parties to the position that existed before the transaction occurred."); 5 Arthur Linton Corbin, *Corbin on Contracts* § 1102, at 548 (1964); John D. Calamari & Joseph M. Perillo, *The Law of Contracts,* § 15.4 (4th ed. 1998) ("The basic aim of restitution is to place the plaintiff in the same economic position as the plaintiff enjoyed prior to contracting."); *cf. Restatement (Second) of Contracts* § 384, cmt. a ("A party who seeks restitution of a

[4] In special cases, when monetary damages are deemed inadequate as a remedy for the breach, a non-breaching party may be entitled to specific performance of the contract. We are not here concerned with such cases.

benefit that he has conferred on the other party is expected to return what he has received from the other party. The objective is to return the parties, as nearly as practicable, to the situation in which they found themselves before they made the contract."). In other words, the objective is to restore the parties to the status quo ante. *See Acme Process,* 347 F.2d at 528; *Far West Fed. Bank*, 119 F.3d at 1367; *First Penn*, 793 F.2d at 272. This is typically not as good as lost profits, from the viewpoint of the non-breacher, but a lot better than nothing.

Restitution is sometimes described in terms of taking from the breaching party any benefits he received from the contract and returning them to the non-breaching party. *See Restatement (Second) of Contracts* § 344(c) ("[The judicial remedies serve to protect the promisee's restitution] interest in having restored to him any benefit that he has conferred on the other party."). That requires determining what benefit from the contract the breaching party has received, and restoring that to the nonbreaching party. This approach makes good sense when viewed, for example, from the perspective of a typical contract for the sale of goods. B contracts to buy 1000 widgets from S, for $10 a widget. B gives S $1000 down, the balance of $9000 to be paid on delivery. S defaults on the contract; B sues for restitution. B gets his $1000 back. The amount that S is wrongfully benefited by the contract is taken from S, and restored to B.

In the case before us, the trial court, faced with a situation in which expectancy damages were ruled out but with a legitimate claim by the plaintiff for a remedy for the Government's breach, fashioned a restitutionary remedy based on the assumed risk that Glendale undertook when it acquired Broward. This was done by taking the value of Broward's obligations or debts at the time the contract was made, and subtracting from it Broward's then-assets. The resulting figure, a negative $798,291,000, was deemed to be the

amount that the Government benefited from the contract, and to which Glendale was entitled as restitutionary damages.

Glendale supports the trial court's conclusion by arguing that Glendale's assumption of the market value of Broward's net liabilities was a benefit to the Government because Glendale thus relieved the Government of its imminent responsibility for those liabilities. Glendale also argues that Broward's net liabilities were Glendale's costs of the merger because when Glendale performed in November 1981, all of the liabilities assumed from Broward immediately became legally binding obligations of Glendale. Glendale further asserts that Glendale's cost of performance or the Government's benefit is to be measured as of the time of its performance (November 1981) and that subsequent events, such as the fall in the interest rates, are irrelevant, except to calculate the offset amount of Glendale's benefit. The trial court found, argues Glendale, that Glendale's expert's offset calculations included all benefits that Glendale's Florida franchise actually received from interest rate declines after the merger. Glendale additionally argues that it is not necessary that the Government's benefit in November 1981 be a cash gain; the Government's benefit is measured by the value of Glendale's performance in November 1981. Thus, whether the Government, absent the merger, would have actually liquidated Broward is irrelevant to the measure of restitution.

The Government's response is that the real figure should be zero. This is because, according to the Government, the amount of Broward's excess liabilities was not a cost to Glendale of performing under the contract because Glendale never actually paid Broward's excess liabilities, and in no scenario would Glendale ever pay Broward's excess liabilities because if interest rates did not decline then Broward would fail, Glendale would fail, and the FSLIC would have had to pay both Broward's and Glendale's depositors. The

Government also argues that the Government never received a $798,291,000 benefit from the contract because the Government would not have liquidated Broward in the absence of a merger with Glendale, and the Government would have been responsible for Glendale and Broward if interest rates had not fallen and both institutions failed.

We conclude that the arguments by both Glendale and the Government are flawed. In the first place, it is clear that the Government's promise that was breached had substantial value. As was developed in the oral argument with Government counsel, given the choice between purchasing a failing thrift without the Government's promise regarding supervisory goodwill and purchasing one with it, a reasonable banker would surely take the latter. Whether viewed as a grant of a special bookkeeping procedure for these cases, or as a promise to waive the regulatory requirement on capital reserves for a specified number of years, there can be no doubt that, for a banker interested in purchasing a failing thrift, the promise was of substantial value toward accomplishing that goal.

At the same time, the action taken by the purchasing S & L in acquiring the failing thrift did not result in the Government, specifically the FSLIC, saving the dollar value of the net obligations of the thrift. For one, it is not at all clear that but for Glendale's purchase of Broward the Government would have been called upon to make up that deficit then and there. Glendale was only one of a number of potential acquirers of Broward. Alternatively, rather than approve a merger, the Government had open to it the option of hiring new and better management to run Broward and make a go of it, just as Glendale itself did. In a very real sense, what the Government received in exchange for its promise was time—time to deal with other failing S & Ls, time to see what the market would do before having to commit substantial resources to the problem. Though the

value of time was more than zero, there is no proof of what in fact it was worth.

It is important to remember that, even after Glendale's merger with Broward, the Government was not free of potential liability for the failing thrift. Had interest rates not come down, and Broward, and perhaps Glendale as well, failed, the Government's contingent liability would have matured, and the FSLIC would have had to step in at that time and assume the very losses that Glendale now claims were benefits the Government received.

Fortunately for both the industry and the Government, the facts of the case are that interest rates did come down, market forces allowed the thrift industry to escape impending doom, and neither Glendale nor the Government was called upon to pay the potential losses the fear of which was the motivation for the scenario in the first place.

This case, then, presents an illustration of the problem in granting restitution based on an assumption that the non-breaching party is entitled to the supposed gains received by the breaching party, when those gains are both speculative and indeterminate. We do not see how the restitution award granted by the trial court, measured in terms of a liability that never came to pass, and based on a speculative assessment of what might have been, can be upheld; accordingly we vacate the trial court's damage award on this theory.

This does not mean that Glendale is without a remedy. Glendale recognized the problems in the restitution award, and cross-appealed, arguing that, should the court reject that award, Glendale nevertheless would be entitled to damages on a reliance theory. Indeed, the trial court recognized this third category of damages, known as reliance damages, and added specified reliance damages to the total award it granted plaintiff.

The underlying principle in reliance damages is that a party who relies on another party's promise made binding through contract is entitled to damages for any losses actually sustained as a result of the breach of that promise. *See Restatement (Second) of Contracts* § 344(b) ("[Judicial remedies serve to protect the promisee's] reliance interest, which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made."); 3 Dan B. Dobbs, *Law of Remedies* § 12.3(1) (2d ed. 1993) ("The reliance recovery is a reimbursement for losses the plaintiff suffers in reliance on the defendant's contractual promise."). As a general proposition, these damages are available for injuries resulting from activities that occurred either before or after the breach. *See* Calamari & Perillo, *The Law of Contracts*, § 14.9 ("[A] party may recover expenses of preparation of part performance, as well as other foreseeable expenses incurred in reliance upon the contract."); *Restatement (Second) Contracts* § 350 cmt. g, illus. 18; *cf. Restatement (Second) Contracts* § 349(b) ("As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance . . . ." (emphasis added)).

In the case at bar, the trial court awarded reliance damages for post-breach events, which the court denominated non-overlapping reliance damages. More specifically, it awarded Glendale damages for the following: lost historic cost of funds advantage over its competitors in the amount of $335,400,000; increased deposit insurance premiums in the amount of $11,480,000; increased Office of Thrift Supervision assessments in the amount of $4,675,000; transaction costs from the sale of University Savings in the amount of $4,472,000; transaction costs from the 1993 reca-

pitalization in the amount of $24,235,000; and custodial fees paid to the Federal Home Loan Bank in the amount of $524,932.

Note that, unlike restitution in which the critical event that fixes the damages is when the contract was entered into, in reliance damages the critical event is the breach itself. Damages consequent to that breach may be the result of actions before or after the breach. Though the trial court limited Glendale's reliance damages to post-breach damages, since otherwise there would be a problem with duplication of the restitution elements, there is nothing inherent in the concept to prevent a court from awarding reliance damages for pre-breach activities from which ascertainable losses as a result of the breach can be shown.

In a case like the one before us, for all the reasons we have explained, we conclude that, for purposes of measuring the losses sustained by Glendale as a result of the Government's breach, reliance damages provide a firmer and more rational basis than the alternative theories argued by the parties. We recognize the appeal in the restitution approach, but we find that keying an award to a liability that was at most a paper calculation, and which ignores the reality of subsequent events as they impacted on the parties, and particularly the plaintiff, is not justifiable. Reliance damages will permit a more finely tuned calculation of the actual losses sustained by plaintiff as a result of the Government's breach.

We appreciate the enormous effort and dedication to these cases by then-Chief Judge Loren Smith in the course of the fourteen months during which he organized the many related cases and finally brought this one to completion. We trust that much of the extensive record before the court will lend itself to re-evaluation in the light of this opinion. As did then-Chief Judge Smith, we urge the parties to these cases to pursue settlements consistent with the facts and the law as they are now understood. Equitable resolution of these cases is in the

interests of the institutions and their shareholders without further unnecessary litigation and its attendant time and expense; it is also in the interests of the United States to settle these cases equitably and fairly, so the cost to the taxpayers can be concluded without further delay.

Accordingly, we vacate the trial court's award of damages, and remand the matter to the court for a determination of total reliance damages to which plaintiff may be entitled. Because the matter is being returned to the trial court for further proceedings, we do not now undertake a piecemeal review of the specific items of reliance damages already awarded; that review will await the final award review when and if it is appealed.

CONCLUSION

The judgment of the trial court is affirmed-in-part, vacated-in-part, and remanded for proceedings consistent with this opinion.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED.

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-772C

GLENDALE FEDERAL BANK, FSB,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

April 9, 1999

OPINION

SMITH, Chief Judge.

This case is before the court after an extended trial on damages. In *United States v. Winstar*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), the Supreme Court held that plaintiff had an enforceable contract with the government to treat supervisory goodwill created as a result of Glendale's acquisition of First Federal of Broward (Broward), as regulatory capital, and to amortize the goodwill over a forty-year period. This contract was breached by the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. No. 101-73, 103 Stat. 183, which eliminated the ability of Glendale to count goodwill as regulatory capital. Plaintiff seeks damages resulting from this breach.

At trial, the court permitted plaintiff to put on evidence of damages based on the three traditional theories of contract recovery: expectation, reliance and restitution. In addition, defendant has filed a motion for summary judgment raising a special plea in fraud based on 28 U.S.C. § 2514 (1994). The

trial ultimately took more than 150 days and more than 20,000 pages of trial transcript, and was conducted over a period of fourteen months. A great proportion of the trial was spent putting on evidence establishing, and challenging, plaintiff's claim for expectancy damages.

After a thorough examination of the record, including the excellent CD-ROM post-trial briefs prepared by the parties in response to 92 questions posed by the court, and a review of the relevant law, the court denies defendant's motion for summary judgment based on the special plea in fraud, and awards plaintiff damages in the amount of $909 million, which reflects the restitution and non-overlapping reliance damages which plaintiff proved at trial. The court denies plaintiff's claim for expectancy damages, for the reasons set forth in the discussion below.

The court should note that the trial went on for so long for several reasons. First, the court made a conscious decision that this trial, the first of more than 120 *Winstar*-related cases pending before the court, would serve to air and test many of the models and theories at issue in most of the other cases. This, it is hoped, will, and appears already to have, provided a useful experience for the *Winstar*-related cases following this one to trial on damages. Second, the issues are complex, involving a huge body of documentary evidence and claims of over $2 billion. The mandate of due process required this court to allow the parties a full opportunity to litigate. This the court did using its general rule allowing the parties all the time they need with no formal limits. Third, the plaintiff requested an early trial date following the Supreme Court's 1996 affirmance of this court's liability decision. This was sought because the breach was having a significant and continuing detrimental effect on the plaintiff. However, the speed of moving to trial in only eight months, in a case involving millions of documents in discovery and a multitude of experts with complex and sophisticated reports, greatly

reduced the efficiency and refinement of the issues normally gained by the court's extensive pretrial process. The lessons learned in this trial, one of the court's longest, if not the longest, in its history, can be of great value, both the positive and the negative lessons.

This opinion is organized as follows: Part I is an overview of the underlying transaction, the breach, and the resulting effect of the breach on the bank. Part II is a summary of the alternative damage theories. Part III examines plaintiff's claim for expectancy damages, and, because defendant's summary judgment motion is premised on matters critical to plaintiff's claim for expectancy damages, that motion is reviewed in that discussion. Part IV examines the reliance claims. Part V examines the restitution claim, while Part VI is the conclusion.

I. FACTUAL OVERVIEW

The facts that are presented here are findings of the court, but they are not intended to be comprehensive. Rather, they are designed to put the contract, breach, and resulting actions in context. Additional factual findings, as necessary, will be discussed as the court deals with each of plaintiff's damage theories.

The facts surrounding the formation and breach of this contract, and the crisis generally affecting the savings and loan industry, have been covered extensively in prior opinions of this court, the United States Court of Appeals for the Federal Circuit, and the United States Supreme Court. *See United States v. Winstar Corp.* 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996); *Winstar Corp. v. United States* 64 F.3d 1531 (Fed.Cir.1995); *Statesman Savings Holding Corp. v. United States* 26 Cl.Ct. 904 (1992); *Winstar Corp. v. United States*, 25 Cl.Ct. 541 (1992); and *Winstar Corp. v. United States*, 21 Cl.Ct. 112 (1990). Glendale Federal was a savings and loan institution primarily doing

business in California. In 1981, Glendale engaged in a supervisory merger with First Federal Savings and Loan Association of Broward County (Broward) in Florida. At the time of the merger, the market value of the liabilities of Broward exceeded the market value of the assets by $734 million. Pursuant to its contract with the government, Glendale was permitted to treat the resulting market value deficit as supervisory goodwill, an asset for purposes of meeting regulatory capital requirements. At the time of the merger, Glendale was, as the Supreme Court found, "profitable and well capitalized, with a net worth of $277 million." 518 U.S. at 861, 116 S.Ct. 2432. Indeed, had Glendale not been able to treat supervisory goodwill as regulatory capital, it would have become immediately insolvent, with a capital deficit of nearly $500 million. This would have, of course, incapacitated Glendale and made it impossible to operate, since it would have been in violation of the regulations with negative net worth.

In essence, Glendale was permitted to book Broward's net excess liabilities (negative net worth) as an asset for regulatory capital purposes, to be amortized on a straight-line basis over 40 years. While the purpose of this contract is now in some respects disputed by defendant, in general terms it is clear that the supervisory goodwill and the long amortization was designed to fill the capital hole, permit Glendale to maintain its ability to leverage its existing capital, give the thrift the ability to generate income to replace the amortizing goodwill and, ultimately, make the whole enterprise profitable.

In 1989, eight years into the contract, FIRREA and its subsequent regulatory directives repudiated the government's contractual goodwill obligations to Glendale. The contract had required the government to recognize Glendale's goodwill as an asset for purposes of regulatory capital over the contract's forty-year amortization period, or until 2021.

FIRREA and its implementing regulations repudiated that obligation by requiring Glendale to deduct goodwill in determining its regulatory capital on a greatly accelerated schedule. As of December 31, 1989, Glendale could not count goodwill as a part of tangible capital at all. Moreover, the amount of supervisory goodwill which Glendale could count as core capital was phased out on a sliding scale and eliminated entirely by January 1, 1995. In addition to mandating the phase-out of goodwill as an asset includable in calculating a thrift's regulatory capital ratios, FIRREA and its implementing regulations also changed the minimum requirements for capital. Specifically, FIRREA imposed three new capital requirements: (1) it required that tangible capital constitute at least 1.5 percent of assets, 12 U.S.C. 1464(t)(2)(B); (2) it required that core capital constitute at least 3 percent of its assets, 12 U.S.C. 1464(t)(2)(A); and (3) it established risk-based capital requirements, in which risk-based capital is measured against the risk-weighted balance of total assets, 12 U.S.C. 1464(t)(2)(C); 12 C.F.R. § 567. The minimum core capital required for an institution to be considered adequately capitalized was subsequently increased to four percent, effective December 1, 1992, by the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Pub.L. No. 101-242, 105 Stat. 2236, and its implementing regulations.

After FIRREA, Glendale ultimately failed the risked-based capital requirement, in March 1992, and the core capital requirement, in December 1992. On January 26, 1993, the Office of Thrift Supervision (OTS) issued under FDICIA a Prompt Corrective Action Directive (PCA) to Glendale requiring it to achieve a core-capital ratio of five percent and a risk-based capital ratio of ten percent. The PCA was ultimately withdrawn after Glendale engineered a massive recapitalization to get it above the FIRREA and FDICIA risk-based and core capital requirements.

These facts are essentially undisputed. It is the task of this opinion to determine what damages, if any, accrued as a result of the government's breach. Glendale contends that it has suffered massive damages resulting from the government's breach, and seeks damages ranging from more than $800 million under its reliance theory to more than $2 billion under its restitution theory. Briefly, plaintiff argues that it conferred huge benefits on the government and suffered huge losses as a result of the government's breach. Defendant, on the other hand, contends under any theory put forward plaintiff is not entitled to any damages, and, to the extent it is entitled to any damages it would only be for the transaction costs incurred in recapitalizing the thrift in 1993. In sum, defendant contends that plaintiff had received all, or almost all, of the benefits of the bargain at the time of the breach and that FIRREA actually was beneficial to Glendale because it forced Glendale to exit what in hindsight turned out to be money-losing lines of business, thus entitling it to little or no damages.

The parties agree on very little in this case. They differ on their interpretations of the law of damages. They differ on their views about the credibility and validity of plaintiff's damage models, particularly plaintiff's model justifying its claim for lost profits. But perhaps most fundamentally, they differ on whether there are any damages at all.

II. THE DAMAGE THEORIES

As stated previously, the court permitted plaintiff to put on evidence in support of an award of damages under the three traditional contract damage measures of relief: expectancy, reliance and restitution. The court will summarize plaintiff's arguments, and defendant's counter to those arguments, under each of the three traditional measures of relief.

1. Expectancy Damages

Plaintiff contends that it is has proved expectancy damages in the amount of $1.603 billion. The amount consists of the following: (1)lost profits from the date of breach to the date of trial; (2) lost future profits from the date of trial until 2021; (3) increased cost of funds; and (4) increased deposit insurance premiums, OTS assessments, and other miscellaneous costs imposed by the breach. Plaintiff contends that it has put forward evidence sufficient to meet the standards for awarding expectancy damages: (a) these damages were both actually and reasonably foreseeable at the time of contract formation; (b) the breach caused the damages; and (c) the damages have been proved with reasonable certainty.

With regard to the lost profits, both past and future, plaintiff contends that the evidence put forward at trial shows that the consequences were both actually and reasonably foreseeable, because regulators knew that Glendale would leverage its regulatory capital in order to grow, in order to pay for the amortizing goodwill and compensate for the excess liabilities it assumed from Broward. Hence, it was both actually foreseen, and reasonably foreseeable, that, should the government breach, Glendale would either have to shrink or raise capital to fill the capital deficit. Moreover, Glendale contends the evidence shows it could not raise capital before it did, leaving balance sheet shrinkage as the only option.[1] Glendale also contends that this breach was the substantial factor which caused it to shrink in order to get back into capital compliance. Glendale argues that, as a

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[1] Required capital ratios are reflected generally in the ratio of capital to total assets. The elimination of supervisory goodwill as an asset for the calculation of its capital lowered Glendale's capital, leaving only two options in an effort to stay in compliance: either raise more capital to support the balance sheet or shrink the balance sheet in an effort to make the non-regulatory capital amount sufficient to support the balance sheet under current regulations.

result, it was also forced to sell its profitable Florida franchise and University Savings, its Washington state franchise. Lastly, Glendale contends that it would have earned at least 1.1% return on its foregone assets but for the breach. As to its future lost profits, Glendale also put forward a "hypothetical preferred stock" alternative model, considered less preferable by plaintiff's principal expert, which is the minimum present value of the cost of replacing the contractual goodwill Glendale should have had at the time of trial.

Plaintiff also contends that it had to pay more for deposits to fund its lending activities as a result of the breach, and that this was both actually foreseen and reasonably foreseeable by the regulators. These regulators would know that an ultimate failure to remain capitally compliant would force the bank to raise its deposit rates in order to attract and keep deposits. Likewise, plaintiff argues that it was both actually foreseen and reasonably foreseeable at the time of contract formation that failure to honor the goodwill provision would impair the capital position of the bank and lead to higher deposit insurance premiums and additional regulatory assessments. Lastly, plaintiff contends it is entitled to the transaction costs resulting from its 1993 capitalization, the 1994 sale of Glendale's Florida franchises and the 1995 sale of University Savings, which Glendale contends it otherwise would not have sold, and custodial fees paid to the San Francisco Federal Home Loan Bank.

Defendant makes a many-pronged attack on plaintiff's theory and evidence. Most significantly, defendant has filed a motion for summary judgment based on a special plea in fraud pursuant to 28 U.S.C. § 2514. Defendant argues that plaintiff's entire damage claim should be forfeited because sworn statements provided by officers of Glendale to this court and the Federal Circuit in prior proceedings, concerning how the breach hampered Glendale's ability to leverage,

squarely contradict those made during trial, which provide the foundation for plaintiff's expert lost profits model.

Defendant offers several legal and methodological challenges to plaintiff's lost-profits theory. Defendant argues that plaintiff's theory of lost profits is methodologically flawed and contrary to settled principles of economics and finance. Defendant further argues that plaintiff's theory is based on a fundamental misunderstanding, or misreading, of what the goodwill contract was all about. Lastly, defendant contends that this theory would require the court to engage in a far more speculative inquiry than that already rejected in *Wells Fargo Bank, N.A. v. United States,* 88 F.3d 1012 (Fed.Cir.1996).

As to plaintiff's consequential damages resulting from the breach, defendant argues that these were not caused by the breach, but by plaintiff's own actions, and that, causation notwithstanding, they are methodologically unsound regardless.

2. Reliance Damages

Plaintiff seeks alternatively to recover its reliance interest, which the Restatement of Contracts defines as the "interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made." *Restatement (Second) of Contracts* § 344(b). Glendale claims it has proved reliance damages totaling $862,770,000. Glendale seeks its pre-breach costs of performing under and relying on the contract, including what Glendale considers the cost of acquiring Broward (the assumption of Broward's net liabilities), Glendale's cost of acquiring related Florida operations, and Glendale's payment under the contract's interest rate provision. In addition, Glendale seeks certain post-breach damages caused by investments made in reasonable reliance that the government would perform, including Glendale's

post-breach costs of operating its Florida franchise until it was sold in 1994, as well as Glendale's wounded bank damages[2], which plaintiff contends it would not have had to incur because it would have remained in capital compliance had it never entered into the contract. Plaintiff credits defendant for the benefits it accrued as a result of the contract, including the sale of the Florida franchise, and those benefits from interest rate reductions, loan sale gains, and accretion into income.

Defendant makes three major criticisms of plaintiff's reliance argument, as well as several methodological challenges. First, defendant contends that as a matter of law plaintiffs cannot recover reliance damages because Glendale would have ultimately lost money had the government fully performed. Second, defendant challenges plaintiff's basic contention that Glendale paid anything for Broward; it rejects plaintiff's premise that the assumption of Broward's excess liabilities represents all, or part of, a purchase price paid by Glendale. Third, defendant contends that plaintiff is precluded from seeking reliance damages based on the costs incurred after the breach, including the wounded bank damages and any post-breach operating losses in Florida, because these were not made in reasonable reliance on the contract.

3. Restitution Damages

Plaintiff has proffered evidence for restitution damages as an alternative remedy. According to the Restatement, restitution is the plaintiff's "interest in having restored to him

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[2] "Wounded bank damages" refer to those costs Glendale incurred because of its falling out of capital compliance as a result of the breach. These damages are comprised principally of the increased costs Glendale had to pay for deposits to fund the bank, as well as increased insurance premiums and regulatory assessments. According to Glendale, these are costs it would never have had to pay had there been no breach.

any benefit that he has conferred on the other party." *Restatement (Second) of Contracts* § 344(c). Plaintiff's restitutionary claim, including non-overlapping reliance damages, totals $2.015 billion. As part of the restitution interest, plaintiff claims the following as immediate benefits that defendant received at the moment of the merger: relief from the obligation to pay Broward's excess liabilities; the ability to invest earnings of the government insurance funds which were enabled by Glendale's assumption of Broward's liabilities; Glendale's payment pursuant to the interest rate provision of the contract; and non-overlapping reliance damages (principally its wounded bank damages).

Defendant responds that plaintiff is entitled to no restitution award, for several reasons. First, defendant challenges the notion that plaintiff conferred any benefit on the government, since at all times before and after the merger the FSLIC backed the deposits of Broward, so it was no better off after the merger. Second, defendant contends plaintiff could not provide a benefit, since, at the time of the merger, it was likely insolvent on a market basis. It therefore had no assets to pay off these liabilities. Third, defendant contends that the economics of the transaction show that there is no scenario in which plaintiff could provide a benefit to the government. The merger served to buy time for interest rates to fall, but nothing else. Lastly, defendant argues, even were the court to consider the assumption of the liabilities as conferring a benefit, it would be far less than the market value of the liabilities, since the government had several less costly alternatives it could have pursued.

The government contends that Glendale saved the government nothing. Because it received no monetary benefit, plaintiff is not entitled to recoup money earned by the insurance fund. Even were the court to entertain the notion that plaintiff provided a restitutionary benefit, any award of profits made by the fund is barred by the law of restitution

and is really a claim for prejudgment interest to which it is not entitled. According to the government, the non-overlapping reliance damages are both legally unrecoverable and improperly calculated

4. Defendant's Damage Theory

Defendant contends that plaintiff suffered no damages, and indeed benefitted from the breach, because FIRREA and the new capital requirements forced Glendale to get out of high risk areas of lending that ultimately proved unprofitable, and in which defendant contends plaintiff would have continued to be actively involved. To the extent plaintiff is entitled to any damages, it would only be entitled to $27.98 million, the flotation costs for the recapitalization in 1993.

III. EXPECTANCY DAMAGES

A party's expectancy interest is the "interest in having the benefit of his bargain by being put in as good a position as he would have been had the contract been performed." *Restatement (Second) of Contracts* § 344(a). The largest component of plaintiff's expectancy claim, and the issue that by far occupied the vast majority of trial time, is damages from lost past and future profits. The preliminary issue is whether, and to what extent, a party is entitled to pursue lost profits, and the second inquiry, assuming that lost profits are not otherwise prohibited by law, is whether plaintiff has proved the elements.

The government contends that the law of this Circuit bars the award of lost profits damages based on contracts with third parties. The government argues that a hundred-year line of cases, from *Myerle v. United States*, 33 Ct.Cl. 1 (1897), to the recent decision in *Wells Fargo Bank v. United States*, 88 F.3d 1012 (Fed.Cir.1996), prohibit damages based on "in-

dependent and collateral undertakings . . . entered into in consequence and on the faith of the principal contract." *Myerle,* 33 Ct.Cl. at 26.

Defendant's intellectual problem is that, far from reaffirming any rule prohibiting any lost profits damages based on "collateral undertakings," *Wells Fargo* recites prior law supporting the award of precisely those type of lost profits. *Wells Fargo* involved the failure of the Farmers Home Administration to honor a commitment to guaranty a loan extended pursuant to the federal ethanol loan guaranty program. The Court of Federal Claims awarded lost profits damages on the theory that the failure to guarantee the loan reduced the capital of Wells Fargo, which consequently reduced the ability of Wells Fargo to lever that lost capital, resulting in lost income because it could not make otherwise profitable loans. The Federal Circuit rejected the holding of this court that plaintiff was entitled to lost profits based on this theory:

> Wells Fargo's loss of interest on additional loans it allegedly could have made had there been no breach is "too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of contract in this suit." *Id.* (citing *Ramsey v. United States*, 121 Ct.Cl. 426, 101 F.Supp. 353, 357-58 (1951)).

Wells Fargo, 88 F.3d at 1023. Critical to this issue is the purpose of the contract. In contrasting this case to another case, *Neely v. United States*, 152 Ct.Cl. 137, 285 F.2d 438 (1961), the Federal Circuit in *Wells Fargo* stated:

> Unlike the present case, the profits lost in Neely were profits on the use of the subject of the contract itself. Indeed, the only purpose of the contract in Neely and the other cases was for plaintiff to make profits on the subject of the contract—through mining, dairy cow operations, or property resale.

> In the present case, the purpose of the guarantee was to enable Wells Fargo to make profits from the interest on its loan to High Plains, not on some other loans it might make.

Wells Fargo, 88 F.3d at 1023. Critical to the inquiry, then, is what the purpose of the contract is. Although, as it happens, Wells Fargo and Glendale happened to use the same expert, who happened to put forward a lost profits theory based on lost leverage, the contracts, and their purposes, are very different. The question is not whether the profits are to be derived from undertakings with third parties, but what the subject and purpose of the contract is. *Neely* and *Chain Belt v. United States*, 127 Ct.Cl. 38, 115 F.Supp. 701 (1953), involved profits made from deals with third parties. The fundamental and initial question then is whether the subject of the contract, its very purpose, was to enable Glendale in this instance to generate profits through leverage. If the answer is yes, then Glendale should be entitled to show the other elements; if not, if these lost profits do not emanate from the subject matter of the contract itself, then they would properly be construed as "incidental and collateral undertakings" unrelated to the contract and hence unrecoverable. *See Ramsey*, 101 F.Supp. at 357-58.

Wells Fargo does not appear to alter the traditional rule that expectancy damages, including lost profits, are recoverable, so long as they are either actually foreseen or reasonably foreseeable, are caused by the breach of the promisor and are proved with reasonable certainty. The issue of foreseeability is interrelated to the issue of purpose, as described by the Federal Circuit, and assists in resolving the question of foreseeability. To be sure, plaintiff and defendant differ strongly on what the purpose of the contract was, and hence whether any resultant lost profits are foreseeable. But it appears clear to the court that neither *Wells Fargo* nor any other precedent operates *per se* to bar lost profits.

The court must then inquire as to what the purpose of the goodwill promise was, and whether that damage caused by the breach was either actually foreseen or reasonably foreseeable by the government at the time of contract formation. Defendant contends that the purpose of the contract was quite limited: it was, according to the government, designed to "buy time" until interest rates fell. Hence, there is no reason to think that, as part of this contract defendant contemplated or foresaw that the goodwill would be used as a leveraging device. The evidence adduced at trial, however, strongly supports plaintiff's argument that the central purpose of the goodwill promise was to ensure that Glendale could continue to use leverage notwithstanding the merger, over a sufficient amount of time that would allow it to absorb the costs of the merger while maintaining capital compliance. This is supported by the testimony of two government regulators who were involved in the merger, Dr. James Croft and Mr. Thurman Connell, as well as the testimony of Glendale's former president, Mr. Norman Coulson. The testimony of Mr. Brett Beesley, former Director of the FSLIC at the time of the merger, relied on by defendant in support of its narrow construction of the contract, does not contradict this reasoning. Mr. Beesley testified that the contract was designed to "buy time" until interest rates fell. "Buying time" was certainly part of the equation, but another part of the equation was to give Glendale the wherewithal to continue doing business, which in the case of a thrift means making loans, notwithstanding an otherwise severe capital deficit. Supervisory goodwill enabled the thrift to do so. In fact, if the government's interpretation was correct Glendale would have been very foolish, if not crazy, to enter the contract.

The evidence shows that a central purpose of the contract was to enable Glendale to survive and continue profitable business after the merger. The testimony of Dr. Croft and Mr. Connell supports a finding that this was actually foreseen at the time the contract was formed. Further, in light of the

basic nature of the contract it was necessarily foreseeable, by any reasonable regulator or banking official, that the good-will promise was designed to protect Glendale's ability to use leverage after the merger. There was no evidence to the contrary.

The court will address the next two issues, causation and reasonable certainty, in tandem. Plaintiff argues that the breach was the substantial factor in causing it to fall out of capital compliance and ultimately shrink, and that the sales of the Florida franchise and University were the result of the shrink. Plaintiffs then develop a model projecting what they believe is a conservative estimate of what an appropriate average return would be on the lost business size by showing that it would have earned a 1.1% rate of return on its purchased asset portfolio, which is representative of the average return Glendale likely would have earned on all its foregone assets.

The court believes that plaintiff's lost profits model suffers from serious defects, which undercut the basis for using it as a credible model for ascertaining lost profits damages based on the government's breach of the contract 32 years before it was supposed to end. Ultimately, the court finds that there are enough infirmities in the damage model to undercut its credibility in determining Glendale's lost profits as a result of the breach from 1989 to 2021. While the court believes there were indeed significant lost profits, plaintiff's model does not adequately prove the amount. The type of damage inflicted by the breach, the high quality of Glendale's management team, the institution's survival of the breach, and the post-breach world, while many other savings and loans failed, and the current profitability of the institution at the time of trial, all support a strong inference of substantial profits in a non-breach scenario. However, the problem is quantification.

The court will discuss several of these infirmities, but an important one, the apparent inconsistencies of the affidavits

of Mr. Stephen Trafton and Ms. Kathryn Snyder which were before the court in prior proceedings, and the statements made during the damages trial, illustrate exactly what the problem is in composing a lost profits damage model. The government points to a series of statements made in affidavits by two Glendale officers, Mr. Trafton and Ms. Snyder, contained in prior submissions to this court and the Federal Circuit. These statements were filed as part of plaintiff's Motion for Summary Judgment in 1991, as part of its Motion for Interlocutory Appeal before the Federal Circuit, and as part of its Statement of Remedy Claims before this court in 1993. These statements indicate that the breach of the goodwill provision forced Glendale to restructure and exit out of higher risk-weighted lines of business. The statements are not consistent with statements made by Mr. Trafton and Ms. Snyder during trial—and relied upon by Glendale's principal expert, Dr. Nevins Baxter, in his damage model—that Glendale was planning to exit these same lines of business for reasons unrelated to the breach.

The government's motion for summary judgment based on the special plea in fraud is based on these inconsistencies. 28 U.S.C. § 2514 provides:

> A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

The government argues that the prior sworn statements cannot be squared, and that either in the prior proceedings or in this trial, plaintiff's officers were prevaricating. Defendant therefore argues that it has met its burden of proof in showing that plaintiff intended to deceive the United States about the validity of its damage claims.

At trial, Glendale confronted the discrepancies, and its witnesses offered several arguments for why the prior affidavits were inadvertently inaccurate. Among these were the contention that Glendale's counsel and officers did not appreciate the distinction between events caused by the breach-related provisions of FIRREA and those caused by non-breach related provisions, and that they were confused generally about causation. Mr. Trafton also testified that he was insufficiently attentive at the time the original affidavits were offered, because he was focused on restructuring the bank, keeping it in capital compliance, raising capital, and placating regulators.

The statements contained in prior court submissions do not rise to the level of a showing of fraud, but they do seriously challenge the credibility of plaintiff's trial testimony about the balance sheet structure of Glendale's foregone assets upon which Dr. Baxter relied in developing his model. The court clearly understands, given the wide scope of this contract and the breadth of the changes in the law created by FIRREA, that there was confusion about the effects of the breach on the total operations of Glendale. But one point is particularly clear from the early affidavits: regardless of confusion over causation or breach versus non-breach provisions of FIRREA, the contemporaneous affidavits suggest that Glendale believed at the time that it should continue to invest in higher risk-weighted lines of business. What Glendale believed was profitable is irrelevant to any causation problems. This does not mean fraud has occurred, but rather, more likely, that Glendale cannot help but think about what it would have done with the benefit of hindsight. It also means that *post hoc* reconstructions of this sort are likely to be colored by knowledge of what actually happened, and similarly not credible, absent the existence of less ambiguous or conflicting contemporaneous evidence.

The court notes that plaintiff's lost profits model contains several serious infirmities, which, for reasons similar to those mentioned above, make it unreliable and the lost profits too remote and speculative to be granted.[3] However, the court

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[3] There are several serious infirmities which also render plaintiff's lost profits claim too speculative. First, plaintiff's model is premised on a portfolio of purchased fixed-rate assets funded by retail and wholesale liabilities. Dr. William Hamm, however, testified credibly that the success of such a strategy is premised upon interest rates falling in order to generate a significant return, because short-term liabilities would reprice more quickly than the longer-term assets they fund. However, the evidence also shows that this was inconsistent with Glendale's expectations that interest rates would rise. (For example, Glendale reduced its repricing gap from -5.5 percent at the end of 1991 to 13.4 percent in 1992, which suggests that, during that period, Glendale was restructuring its balance sheet to take advantage of anticipated rising interest rates, even though the model is, as Dr. Hamm testified, premised on rates falling during the same time period.)

Second, while there was much testimony about whether Glendale's model exposed it to interest rate risk levels beyond those that its board, or regulators, would have permitted, and the evidence on that point was inconclusive, it is indisputable that the foregone portfolio would have entailed far greater interest rate risk than the bank otherwise was taking. Although Mr. Trafton, during the rebuttal case, did testify that, absent the breach, Glendale would have had a greater "appetite" for interest rate risk, Dr. Baxter testified that, absent the breach, Glendale would have maintained less interest rate risk. This raises some questions about whether Dr. Baxter's model adequately reflects what Glendale would have done with the foregone assets absent the breach. In the end, Glendale's model is premised upon the acquisition of low credit risk assets and the ability to accurately manage high interest rate risks. This kind of management, of course, is largely, if not exclusively, related to the ability to forecast interest rate movements. While the court has no doubt that Glendale would have been involved in this type of interest rate risk-taking, it is difficult to believe that its entire investment approach would be predicated on such a policy.

Third, the testimony has shown that Glendale does not leverage as much of its capital as it can, even allowing for the .25 percent cushion that Dr. Baxter believes is appropriate. Moreover, Glendale's projected ratios for fiscal years 1998, 1999 and 2000 are all well over the 5% required

realizes that plaintiff faces an enormous burden in setting forth its damage model because the contract, and the resultant breach, affected the entirety of the bank's operations. Both before and after the breach, the goodwill, or lack thereof, affected the decision-making process in all areas. At the same time, the bank is constantly reacting to stimuli—changes in interest rates and interest rate projections, economic growth and downturns, new market opportunities, disintermediation, and technological innovation—that affect its decision-making and planning. The court is satisfied that plaintiff would have benefitted handsomely in the market had the government honored its goodwill promise. The evidence shows that Glendale has had competent management since the breach, with which even defendant's very bright principal expert, Professor Daniel Fischel (now Dean Fischel), agreed. It would have possessed the ability to continue leveraging, while meeting its capital requirements, giving it a comparative advantage in an industry where more than one-third

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core capital ratios. The fact that Glendale is not taking advantage of these opportunities, by acquiring wholesale assets and funding them with some combination of retail and wholesale liabilities, suggests that they either do not exist or are not as profitable as the model would suggest. This is particularly so since, unlike other foregone assets and liabilities of the bank, the strategy in the Baxter model is not nearly as reliant on the retail franchise and core operations of the bank to succeed.

As Professor Fischel explained, it is an elementary principle that one is more inclined to take risks when one is risking less of one's own money. Supervisory goodwill, in effect, permitted Glendale to take more risks, since it could leverage more on less tangible capital. The court believes that Glendale would have taken risks, but that the Baxter model does not really reflect the risks and ultimate rewards. Rather than betting a large portion of the balance sheet on the direction of interest rates, the court believes, given the other testimony about the strength of Glendale's management, its strong retail networks in California, Florida, and Washington, and the state of the economy over the last 10 years, that it would have done very well with its foregone assets, just not in the manner that Dr. Baxter's model predicts.

of the borrowing capacity ultimately was eliminated by FIRREA and FDICIA.[4]

In the event that the court did not accept its model for past and future lost profits, plaintiffs valued the cost of the recapitalization in 1993 at $1.207 billion. Plaintiffs arrived at this figure by calculating the total cash outflows to investors in the recapitalization while subtracting the cash inflows from investing the recapitalization proceeds. Plaintiff estimates that the net cost of raising the $451 million of capital in 1993

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[4] The court finds the testimony of Nobel Laureate Merton Miller, a brilliant scholar, regarding the value of leverage of little utility in this case. Professor Miller testified that any contention that Glendale lost something of value was meritless because leverage, standing alone, has no value. Plaintiffs convincingly point out that, notwithstanding the general principle of finance for which Dr. Miller won the Nobel Prize in Economics in 1990, the situation of thrifts and other lending institutions is different, because they have access to low-cost, government insured borrowings (retail deposits) which are unavailable to other institutions. In addition, the court realizes that other factors, including a thrift's management, the markets it operates in, and its retail branch network, are all relevant to taking advantage of the access to leverage and profiting from it. Banks are ultimately in the business of making money by lending money, and generating a return based on the spread between interest earning assets and interest bearing liabilities.

In support of the government's position that Glendale actually owes the government a debt of gratitude for breaching the contract, it points to statements made by Glendale at the time FIRREA was passed, in which Glendale asserted that it believed the law would benefit Glendale. This, of course, ignores the evidence that Glendale was desperate to protect its rights under the contract, and urged legislators to protect Glendale's rights in any reform legislation that the Congress ultimately considered and passed. But the statement is telling, because it suggests that Glendale realized at the time of FIRREA that it would have the effect of forcing irresponsible operators out of the business by eliminating borrowing capacity. It realized that FIRREA could create what the government considers the relevant economic item—"profitable opportunities"—for thrifts that were well-run and *which were permitted to take advantage of those opportunities.*

at $1.207 billion. Defendant disputes this number and argues, to the extent plaintiff is entitled to any damages as a result of the recapitalization, it is entitled to only the flotation costs for the issuance, which defendant puts at $27.98 million.

There is something inherently odd about this alternative cost of capital estimate. In essence, plaintiff is contending that its capital cost over two and a half times the capital raised. But elementary principles of finance suggest that plaintiff received $451 million and paid $451 million for that money. Although plaintiff shows that it had to pay a premium for this capital, it also had to convince new investors that it had profitable opportunities which would make it likely that their investment would bring a return. Moreover, the evidence showed that the offering was conditioned on raising the entire amount, so investors did not have to pay a risk premium to cover the chance that Glendale would nonetheless be imminently seized. The court does not find this to represent a plausible cost of the capital. The court does not, however, consider this issue definitively, as it was first raised in the rebuttal case as a non-preferred alternative measure of damages.

At the same time, defendant's argument that plaintiff's recovery should be limited to the flotation costs of the offering would be justified only if plaintiff had made no efforts to raise capital prior to 1993. Defendant made several arguments, including a theoretical argument that an entity can always raise capital if it has profitable opportunities, and an event study[5] showing that Glendale's stock price improved in

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[5] The court's view of the value of event studies was informed significantly by what apparently happened to the price of Glendale's stock after the court held a status conference with the parties at the close of plaintiff's case-in-chief. This is something that the court has quite often done in past cases, in an effort to let the parties know how the judge views the case at that point in the trial and also to guide them towards settlement if possible. The court apprised the parties that it believed plaintiff had

the days after the passage of FIRREA, to support its hypothesis that Glendale, indeed any thrift, could have raised capital after the passage of FIRREA. The credible testimony of persons who actually raise capital, and who were involved in the market at that time, however, severely undercuts this theoretical argument. Plaintiff's investment bankers all testified that the capital markets to thrifts generally, and to Glendale specifically were closed after the passage of FIRREA, and the evidence offered by Glendale's officers at the time clearly indicated that plaintiff was endeavoring to raise capital to fill its capital hole in the immediate years after the breach. These efforts were extensive and without success. There was no credible evidence that Glendale could have raised additional capital before it actually did in 1993.

The court will review the "wounded bank" portion of plaintiffs' damage claim in its discussion of restitution and reliance damages.

IV. RELIANCE DAMAGES

Plaintiff seeks, as an alternative, reliance damages in the event that lost profits have not been proved. As stated previously, the reliance interest seeks to put the injured party

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presented a strong case, but that this opinion obviously was made without the benefit of hearing the government's case, and the court obviously would reserve judgment on the merits until defendant had presented its case. Notwithstanding this limited statement, the market adjudged it to be very pro-Glendale, and Glendale's stock price rose considerably immediately afterwards. This phenomenon illustrated to the court, which believes very little could be read from these remarks, how speculative and unreliable event studies were. If the market has this difficult a time evaluating these remarks, it needs more than one week (the time period of Professor Fischel's event study) to digest all the new information inputs created by FIRREA. It certainly calls into question the relevance of the stock price of Glendale immediately after the merger. While long-term market valuation is often a very reliable indicator of value, short-term market effects can be caused by the most frivolous speculation.

"in as good a position as he would have been in had the contract not been made." *Restatement (Second) of Contracts* § 344(b). Glendale seeks both pre-breach and post-breach costs associated with the contract that it claims it otherwise would not have had to incur absent the contract. The pre-breach costs consist of the purchase price for Broward (which plaintiff figures as the excess of its liabilities assumed by Glendale), the cost of acquiring related Florida operations, which it otherwise would and could not have done had the contract not been entered, and Glendale's payment of $18.24 million to the government under the contract's interest rate provision. In addition, plaintiff contends that it is entitled to certain post-breach damages it incurred in reliance on the contract, including all post-breach losses from the sale of the Florida franchise in 1994 that were made in reasonable reliance on the contract, as well as post-breach wounded bank damages that resulted from plaintiff's failure to remain in capital compliance. When plaintiff nets out the various benefits it gained from the contract, it arrives at total reliance damages of $862,777,000.

Defendant contends that plaintiff is entitled to no reliance damages. As a preliminary matter, although the government agrees that reliance damages are an appropriate alternative if proved, it argues that such damages should not be allowed in this case. Defendant cites *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182, 191 (2d Cir.1949), for the proposition that the court should not "knowingly put plaintiff in a better position than he would have occupied, had the contract been fully performed." Because, the argument goes, the breach forced Glendale to exit ultimately unprofitable lines of business, it benefitted Glendale, and the court should not reward a party that was not harmed, and indeed benefitted. The court finds the legal principle sound, but irrelevant to the facts. Although the government sufficiently cast doubt on the credibility of plaintiff's damage model for the purpose of proving the amount of expectancy damages, it

did not alter the other evidence put on by Glendale that shows a real and large amount of economic harm suffered. The court agrees that the evidence about precisely what Glendale would have done, in the absence of the breach, has not been shown to warrant awarding lost profits, but neither has there been any showing that they Glendale benefitted from the breach. Indeed, defendant's own principal overarching argument against the awarding of lost profits—that it requires a clairvoyance that only the benefit of hindsight and history can give a mortal—argues against its argument that Glendale was better off thanks to the government's breach.

Defendant makes two additional significant arguments against plaintiff's reliance damages. First, defendant argues that the starting point for awarding reliance damages, which plaintiff does by crediting the excess of Broward's liabilities over its assets, is not reliance damages, properly considered. The court tends to agree, and believes that this liability assumption is better understood under a restitutionary theory. This is so because, while the evidence obviously shows that Glendale assumed the entirety of Broward's liabilities and its assets, and was responsible for the difference (to be assisted by the government's goodwill), it did not show that it actually had to expend that amount in reliance on the contract. Rather, it assumed the debts, promised to pay off liabilities as they came due or were demanded, and, it was hoped, return the entire operation to the black.

The government's other argument is that Glendale is not entitled to post-breach reliance damages. The defendant cites only one Bankruptcy Court case, *Sulakshna, Inc. v. Transmedia Network, Inc.*, 207 B.R. 422, 434 (Bankr.E.D.Pa.1997) in support of this proposition. That ignores the real issue, though, which is whether Glendale suffered these damages, either pre- or post-breach, in reasonable reliance on the promise. Hence, post-breach reliance damages, if made in reasonable reliance on the government's contract, are

certainly awardable if proven. Thus, there is no legal or economic principle which supports the government's contention. The government states: "reliance on the contract for five years after the breach cannot be reasonable." The court disagrees, given the nature of this contract, which involved a transaction that altered Glendale's balance sheet radically at the time of the merger, affected its operations for eight years before the breach, and then required another massive restructuring of its balance sheet. In this setting, reliance damages can be shown, even many years after the contract. Indeed, plaintiff's claims for post-breach reliance damages are classic reliance. If proved, they are classic reliance damages because they seek to reimburse plaintiff for costs it never would have incurred had the contract never been entered. The fact that the breach was so devastating, and affected the totality of the bank such that these costs were incurred long after breach, if proved, is hardly a reason for finding reliance damages "unreasonable."

The extent of reliance damages to which plaintiff is entitled will be discussed in the section on restitution damages.

V. RESTITUTION DAMAGES

Restitution is a party's interest in having restored two [sic] him any benefit that he has conferred on the breaching party. *Restatement (Second) of Contracts* § 344(c). The leading precedential case in the Circuit, cited by both parties in respect to their positions, is *Acme Process Equip. Co. v. United States*, 171 Ct.Cl. 324, 347 F.2d 509 (1965). *Acme Process* both affirms the availability of restitutionary relief in breach of contract cases against the government and sets the standard for such an award. "The applicability of restitution as an alternative for breach is well-established in both the federal and state courts." *Id.* at 528. But, the court also stated another standard regarding the limits of restitution in the contract sphere. Its purpose is "to restore the innocent party to its pre-contract *status quo*, and not to prevent the

unjust enrichment of the breaching party." *Id.* at 530. The court is thus guided by two principles, that restitution is an appropriate contract damage remedy, but that it is not designed to punish the breaching party.

It is the court's view that restitution provides the clearest and best rule for allocating damages in this case.[6] That is because the complexity, breadth, and length of the contract which was breached make it difficult to award expectancy damages, including Glendale's lost profits, which the court believes would be most consistent with the very purpose of contract law. The difficulty, as plaintiff's model demonstrates, is the bank is operating in a dynamic market, making dynamic decisions, and responding to millions of stimuli in order to run a profitable enterprise. The government's breach fundamentally altered how the bank did these things, which makes it difficult to determine what plaintiff would have done to generate a return on their regulatory and regular capital. The extent of the breach, and the consequent difficulty in

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[6] The government also argues that restitution is limited by expectancy damages. The government cites the Restatement (Second), which states: "Although [restitution] may be equal to the expectation or reliance interest, it is ordinarily smaller because it includes neither the injured party's lost profit nor that part of his expenditures in reliance that resulted in no benefit to the other party." *Restatement (Second) of Contracts* § 344 cmt. a. Defendant also cites *Kinzley v. United States*, 661 F.2d 187, 228 Ct.Cl. 620 (1981) for the proposition that plaintiff cannot invoke alternative theories of recovery when the measure of damages that would place him in the same position as if the promised performance had been carried out can be established. *Id.* at 193. The court does not disagree that expectancy, which in this case includes lost profits, because it was both foreseeable and the very purpose of the contract, would be preferable, in order to ensure that plaintiff got the benefit of the bargain. But proving such damages in this instance has proved impossible. That does not mean that plaintiff should not be able to prove, and get, a recovery that, as best as possible, attempts to make it whole. To rule otherwise would allow the very severity of the damage suffered by the non-breaching party to benefit the breaching party.

ascertaining lost profits, does not, and should not, however, immunize the government from paying appropriate damages.

Restitution provides a remedy, and a fair one. The government received a very significant benefit in 1981, when Glendale merged with Broward. It then failed to honor its promise to Glendale upon which the contract was premised. This created a total and material breach, effectively denying Glendale both all the benefits of the contract and placing it in a far worse position than it was before the contract was entered. Restitution, which is designed to return the parties to the position they would have been in had the contract not been made, would assign any benefits conferred on defendant at the time the contract was formed to plaintiff.

There are three principal components of plaintiff's restitution claim. First, plaintiff claims restitution damages in the amount of $509.921 million, which is the amount by which the liabilities of Broward exceeded its assets, less the total value of all benefits Glendale received from the transaction. Second, plaintiff claims restitution damages for the interest earned on the money in the FSLIC insurance fund that the government was able to invest because it did not have to cover Broward's shortfall. This totals $1.111 billion. Third, plaintiff claims that, in addition to its restitution damages, the law entitles it to any non-overlapping reliance damages which it paid, which it would not have paid had the contract not been entered.

As discussed more fully below, Glendale is entitled to restitution damages for the benefit conferred on defendant when the contract was entered in 1981, in the amount by which Broward's assets exceeded its liabilities on the date of the merger, less the value of the benefits Glendale received from the contract. It also is entitled to non-overlapping reliance damages which it proved that it suffered, but would not have, had the contract never been entered. It is not entitled, however, to any interest earned by the FSLIC on any

funds which the FSLIC had at its disposal because it did not have to cover Broward's deficit. Plaintiff and defendant differ fundamentally on the value of these things.

a. Value of Glendale's assumption of Broward's liabilities

Glendale values this benefit at the dollar value of Broward's net liabilities, or $798.291 million which Glendale relieved defendant from the obligation to pay after the contract was formed.[7] Defendant, on the other hand, values the benefit at "zero, or near zero."

Defendant makes several arguments in support of valuing the benefit to the government at zero. First, defendant argues that Glendale was insolvent, or nearly insolvent, at the time of the merger, and therefore had no capacity to confer any benefit on defendant. Second, the problems that had beset the industry, including Glendale and to a larger extent Broward, were based on the sustained historically high interest rates. These hurt thrifts which had to fund their operations with high-cost short-term borrowings while their assets were locked in low-interest, fixed-rate loans. Thus, according to the government, Glendale could give the government nothing: either interest rates would come down, and Broward's—and Glendale's—problems would be eliminated, or interest rates would stay high, at which point Glendale and Broward would both have to be liquidated. Consequently, Glendale was a vehicle to maintain Broward until, regulators prayed, rates would come down. Third, the government argues, to the

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[7] Pursuant to the contract, the supervisory goodwill that plaintiff was entitled to amortize over the course of the contract was $734 million. However, the market value of the excess of Broward's liabilities over its assets on the date the merger was approved was $798.291 million, which includes the market value of the net loss as of September 30, 1991, as calculated in the November 19, 1981, FHLB Board package, as well as an additional $14.484 in losses between September 30, 1981 and November 19, 1981, which both Drs. Baxter and Horvitz believed should be included.

extent any benefit was conferred, it was worth far less than the dollar value of Broward's excess liabilities, because the government would never have liquidated Broward and would have picked another, much less costly, weapon from its arsenal to deal with the problem.

The government's challenges to benefits conferred on it by the contract are either wrong, and contradicted by the regulators themselves, or irrelevant to the inquiry. As to the question of Glendale's market, as opposed to book, solvency, the question is irrelevant. The government offered the opinion of Dr. Hamm that Glendale was market insolvent at the time of the merger. The court takes no position on the credibility of this opinion, because it is irrelevant. Regulators were concerned with book value solvency and the ability of the institution going forward to be viable, and to take responsibility for managing—and paying—the liabilities of Broward as they came due. These are both things that Glendale clearly possessed, and were the relevant criteria for the regulators. Similarly, the government's argument that plaintiff could not offer any benefit to the government because both Glendale and Broward suffered from the same endemic problem is irrelevant. Plaintiff had something the government wanted: a healthy thrift that had managed the sustained high interest rates much more successfully than Broward, and which was poised to survive.[8]

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[8] This government argument also presumes that the government was taking a wild gamble, in essence playing a "double or nothing" game with the FSLIC insurance fund and, ultimately, the taxpayer's money. That is because, if the government truly believed its fatalistic argument, it was willing to gamble the health of two thrifts, one far more viable than the other at the time of the merger, in the hopes interest rates would come down. There would either be prosperity or a catastrophe. That would simply be irrational, and a desperate roulette wheel gamble. As Dr. Croft testified, the regulators were not interested in simply creating a larger institution with even larger losses which would be back on the regulator's doorstep at a later date. A more realistic view, which is supported by

Third, the government argues that any benefit was far less than the dollar value of the net liabilities Glendale assumed because the government would never have liquidated Broward had there been no contract. The court questions whether this would be relevant, but it does not matter, since defendant provided no evidence that it would not have liquidated. Prior to trial, the court anticipated that defendant might put on evidence showing it had a formal policy for resolving these matters, and that those costs could be ascertained. But what became clear from the testimony at trial was that the government had no policy or policies, and dealt with their mounting inventory of problem institutions at that time on an ad hoc basis. This was an effort to mitigate a growing disaster, with one goal in mind: to dispose of problems or soon-to-be problems and then worry about the next problem. There was no rational, sustained resolution strategy in place, so the government and the court simply cannot know what would have happened had the contract not been entered: However, anecdotal evidence in the testimony suggests that if Broward was not liquidated a more likely government takeover would have significantly expanded the loss to the government beyond the immediate liquidation loss.

The court does know that on the date of the merger Glendale assumed the liabilities of Broward, every dollar of them, and the thrift was responsible for ensuring that Broward's operations, and most relevantly, its obligations as they became due, would be met by Glendale. At that time, the entire operations of Glendale, including its capital, were pledged to that effort, and the government was similarly

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the testimony of government regulators, is that the government believed that the merged entity, with the relative health of Glendale, would make profits, fill its capital hole, thrive, and hence relieve the government of liability.

relieved of its obligation for those liabilities.[9] In addition, the testimony adduced, including that of Dr. Croft, Mr. Connell, as well as the government's own witness, the former Director of the FSLIC, Brett Beesley, (who testified, "we would not see this situation back because it would be resolved"), confirms that the parties viewed this as a permanent solution. As Dr. Croft pointed out, and common sense shows, it would be irrational to view it any other way. Dr. Croft was an impressive witness. His statements were clear, factual and not affected in the least by the cross-examination.

Most tellingly, the regulators who engineered the deal *at the time it was made* valued the benefit to the government at three-quarters of a billion dollars, or roughly what Glendale currently says was the immediate benefit to the government. FHLBB Chairman Richard Pratt stated that "the solution which FSLIC found is one which appears to save the people of the United States . . . approximately three-quarters of a billion dollars." Moreover, far from considering this deal valueless, as the government now contends it was, FSLIC Chairman Beesley sated at the time that he did not think the government would "ever see a deal like this one in terms of its benefit to the FSLIC." The government's own statements at the time do not support its currently articulated litigation

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[9] The court understands, of course, that the FSLIC stood behind almost all of these liabilities, both before and after the merger. Just because this contingent liability existed, however, does not mean that the government did not receive a thing of very real value in consideration. The evidence is unambiguous that the government considered this to be a permanent solution that resolved a potential problem, and it would be irrational to view it otherwise. In addition, the logical implication of the government's argument is that plaintiff could and did provide nothing of value because the government continues to back the deposits. This would suggest that there was no consideration exchanged, which goes to the heart of the liability question, already conclusively resolved in plaintiff's favor. *See United States v. Winstar*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).

theory that the contract provided no benefit to the government or the people of the United States.

Accordingly, the value of the benefit conferred by Glendale to the government, at the time the contract was made, is $798.291 million, which is comprised of the government's contemporaneous calculation of the total loss to FSLIC avoided by the merger through September 30, 1981, as well as additional losses of $14.5 million incurred by Broward between September 30 and November 19, 1981.[10] The government does not dispute these numbers, only their relevance to any damage award, so the court accepts plaintiff's calculation.

Plaintiff also seeks restitution in the amount of $18.24 million that Glendale paid to the government under the interest rate shifting provision of the contract. The government argues that this portion of the contract is discrete and fully performed by both parties so that recovery is unwarranted. Plaintiffs put forward persuasive evidence that this provision was negotiated as part of the overall agreement, and that the terms of the overall contract would have been

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[10] The government cites two recent cases, *Far West Federal Bank, S.B. v. Office of Thrift Supervision-Director*, 119 F.3d 1358, 1367 (9th Cir.1997) and *RTC v. FSLIC*, 25 F.3d 1493, 1504-05 (10th Cir.1994) in support of the proposition that the court cannot grant an award that exceeds Glendale's initial cash investment. The court notes, first, that in other *Winstar* litigation the government has recommended that the court not follow *Far West* because it is not the law of the Circuit. The court does not believe it has been transformed into that now. Regardless, the cases are factually distinct, and involve the recovery of cash restitution for investors of their initial investments. These investors however, did not pledge the entirety of their existence as a viable enterprise to the government as part of the contract, like Glendale did, and assume individually all the obligations of the institutions in which they were investing, as Glendale did. Aside from the presence of banks and the alphabet-soup banking agencies, the cases are factually very different, and legally irrelevant to the resolution of this restitution claim.

altered, had the government not agreed to grant a 40-year amortization period. As the affidavit of David Hansen indicates, had Glendale not received the benefit of the 40-year amortization protection it would have demanded other modifications, including greater interest rate protection and other government assistance. It is impossible to treat the provision as autonomous, and plaintiff is entitled to the return of these payments, the amounts of which are not challenged by the government, as restitution of a benefit conferred on the government.

b. Interest benefit that the government gained

Plaintiff argues that it is entitled to the interest that the FSLIC fund earned on the funds that it did not have to use to liquidate Broward, which plaintiff calculates at $1.11 billion. Plaintiff put on credible evidence that it was understood, and a consideration of regulators, that this merger would enable the insurance fund to preserve, and augment through investing, the amount in the fund. However, it is axiomatic that, as *Acme Process* instructs, restitution damages are recoverable in contract, but not in such a manner as to prevent the unjust enrichment of the non-breaching party at the breaching party's expense. To the extent that the theory of restitution contemplates the disgorgement of benefits without a corresponding loss to the plaintiff to prevent unjust enrichment, it is when a tortfeasor, rather than a contracting party, breaches a duty. The rule is designed to ensure that a wrongdoer does not benefit from his wrongful action.

The disgorgement of any interest earned in the fund would have to be under an unjust enrichment theory. Restitution in the contract realm is designed to put the non-breaching party back in the position it would have been had the contract never been made. In this instance, a clear benefit to the government was the assumption of the liabilities, which is properly credited to plaintiff, since prior to the contract plaintiff did not have an additional $798 million in liabilities for which it

was responsible. However, the benefits are unequal, because prior to the breach Glendale did not have the money to cover the liabilities; what it had was the ability to assume those liabilities and, going forward, subject to the conditions of the contract, to assume and pay off the liabilities of Broward as necessary. It did not have $798.2 cash to invest at a market rate, which the FSLIC did. There was a disequilibrium of position which enabled the FSLIC to do what Glendale could not do before the contract. To award Glendale those costs would be to award Glendale dollars that it could not possibly have invested had the contract never been entered. It would disgorge benefits that the government earned as a result of the contract that, although made possible by the contract, could not have been earned by Glendale. Glendale is not entitled to that interest earned on the assets of the insurance fund.

c. Non-overlapping reliance damages

The purpose of contract damages is not to punish a breaching party; rather, it is to do justice for plaintiff and try, as closely as possible, to approximate its damages. Moreover, the rules governing the three interests are not strict and separate. As the *Restatement (Second)* notes: "The interests described in this Section are not inflexible limits on relief and in situations in which a court grants such relief as justice requires, the relief may not correspond precisely to any of these interests." *Restatement (Second) of Contracts* § 344 cmt. a. The court therefore sees the categories of restitution, reliance, and expectancy as not inflexible and completely separate, but designed to enable the court to fashion a remedy that adequately compensates a party for damages it has suffered.

On that point, both parties agree that a party may not recover both expectancy and restitution damages, because the party should not be able to get the value of what it conferred to the other party as well as the full value had the party fully performed. One remedy seeks to put the non-breaching party

in the position it would have been in had the contract not been made, while the other seeks to put it in a position it would have been in had the contract been performed. On the other hand, plaintiff argues that it should be entitled, in addition to its restitution award, to any other non-overlapping reliance damages. Defendant objects generally to the award of these damages, whether standing alone or as part of any restitution award.

Plaintiff cites several cases in support of the proposition that an aggrieved party is entitled to recover its restitution interest as well as any non-overlapping post-breach costs that plaintiff suffered which it never would have suffered had there been no contract, and no breach of contract. *See, e.g., CBS, Inc. v. Merrick*, 716 F.2d 1292, 1296 (9th Cir.1983). Also, this concept is not inconsistent with the theory of both restitution and reliance, which are designed to put the non-breaching party back in the position it was prior to the contract, because plaintiff should not have to suffer any post-breach costs it would not have had to pay had there been no contract, and hence no breach. Plaintiff, thus, should be entitled to recoup any such damages if proved.

The principal amount of non-overlapping reliance damages plaintiff seeks are "wounded bank damages" caused by Glendale's failure to maintain capital compliance after the breach. Glendale showed, first, that it had an historic advantage in cost of funds over its competitors in the 11th District for a ten-year period prior to falling out of capital compliance in 1992; it also provided credible evidence, through its highly qualified and perceptive expert Dr. Paul Horvitz, that Glendale would not have fallen out of compliance but for its entry into this contract and the subsequent breach by the government. Dr. Horvitz possessed the unique blend of a brilliant academic and a practical former regulator with an impressive bibliography dealing with issues relevant to this case. The evidence showed that Glendale lost

an historical cost advantage over its competitors because the government's breach ultimately forced Glendale out of capital compliance. Glendale's officers and experts also credibly testified to the effect on depositors when a bank falls out of compliance and is subject to a PCA. It also showed that a typical and logical response is to raise rates to both attract and keep deposits. Accordingly, since plaintiff has proved adequately its wounded bank damages, it is entitled to recover these, as non-overlapping reliance damages, in addition to any restitution recovery. This amount compensates plaintiff, for damages it actually suffered, but which are not protected by its restitution interest. This amount, pursuant to the credible model presented by plaintiff's expert Dr. Baxter, is $335.4 million.

d. Other miscellaneous relief

Plaintiff seeks $11.48 million for increased deposit insurance premiums and $4.675 million in increased OTS assessments which it incurred as a result of the breach. Plaintiff argues that these are either restitution or reliance damages. They are more appropriately styled reliance damages suffered as a result of falling out of capital compliance. The discussion in the section above indicates they would not have been incurred had there been no contract and consequently no breach. Plaintiff is hence entitled to this amount as non-overlapping reliance damages.

Plaintiff also seeks an additional $29.232 million in other increased post-breach costs. These are comprised of the transaction costs from the sale of University Savings ($4.472 million), the transaction costs from the 1993 recapitalization ($24.235 million) and custodial fees paid to the Federal Home Loan Bank ($524,932). Plaintiff has shown that all these costs were suffered as a result of the breach, and would not have been incurred had the bank not fallen out of capital

compliance. They are not protected by the restitution interest, but are likewise recoverable as non-overlapping reliance damages.

e. Offsets to plaintiff's restitution claim

It is of course the purpose of restitution to put the parties back in the position that they would have been in at the time of contract formation had there been no contract. Concomitant with an award based on the benefit conferred to the breaching party is a credit to the breaching party and an offset to the restitution award by the amount of any advantages the non-breaching party received under the contract. Mr. Brad Plantiko of KPMG Peat Marwick has meticulously, and credibly, documented that the gross recovery by Glendale from Florida under the contract is $288.37 million, which reflects the 1994 premium it received for the sale of Broward, loan accretion, interest rate declines, and loan sale gains.

f. Conclusion

Plaintiff is entitled to recover $908.948 million in restitution and non-overlapping reliance damages. This is comprised of the net benefit conferred on plaintiff, $798.291 million, less offsets credited to the government for benefits that plaintiff received as a result of the contract, in the amount of $288.37 million, for a net benefit of $509.921 million. It includes additional restitution damages of $18.24 million paid pursuant to the interest rate provision of the contract, the non-overlapping reliance wounded bank damages of $335.4 million, the non-overlapping reliance damages of $16.155 million for increased insurance premiums and OTS assessments, and the other $29.232 million in post-breach reliance damages which were caused by the breach.

The court contemplated one alternative theory of damages not directly dealt with by either party. Plaintiff has asked for restitution damages based on the amount of the immediate

benefit conferred by the institution upon the government at the time of contract formation, and the court has awarded this based upon the reasoning stated above. Glendale also asked for a recoupment or disgorgement of the profits that the FSLIC fund earned after that time from the amount that the fund was saved. Even though the evidence is clear that the government saw these earnings as a very real benefit that the contract brought the government, the court denied this part of the claim, over a billion dollars. The court denied the amount because Glendale would not immediately have been able to earn this money since it did not have the $798 million in cash to use in the non-merger world, that would have occurred had the contract never been entered into.

However, if the government had lived up to its legal obligations and paid restitution on the day of the breach, making Glendale whole on that date, Glendale would have had the use of that capital from the date of breach until the present. Therefore, a realistic economic measure of Glendale's loss in addition to the pre-breach restitution, would be the return of the profits the FSLIC fund has earned from the date of the breach until the time of payment of the judgment. This award would be based on the government's actual gains from the transaction. The theory or amount was never put forward at trial, and would be an alternative measure to the non-overlapping reliance damages. Because of the uncertainty of this amount (probably over $500 million since the time of breach was about mid-point between contract formation and today) and the novel legal issues involved, the court has decided that the non-overlapping reliance damages are a surer measure of plaintiff's damages since the breach, although they probably do not compensate plaintiff as symmetrically or as adequately.

VI. CONCLUSION

Much of space in the post-trial briefs was spent arguing plaintiff's right to argue each of the three remedies, and whether plaintiff could elect the remedy that gave it the most damages. The court need not deal with the issue, because the court believes it has crafted a remedy that attempts, as best as possible, to compensate plaintiff for the actual amount by which it was damaged under traditional restitution theory. The court recognizes that damages, particularly involving a thrift that entered a 40-year contract 18 years ago, which was breached nearly ten years ago, necessarily is not going to be found with the precision that one could determine damages resulting from the breach of a smaller, more discrete contract. But this should not, and cannot, defeat plaintiff's claim for damages. Put simply, the government should not be immunized from paying contract damages because the extent of both the contract and breach, and the time that has elapsed between the breach and today, makes it more difficult to calculate or conceptualize damages. The court has thus endeavored to deal as best as it can with the problems posed by the passage of time and the magnitude and complexity of the contract and the government's breach. The court believes its damage award, as closely as possible, compensates plaintiff for the damages it has suffered.

The court must also raise what is a troubling feature of this case. Plaintiff's contract was breached nearly 10 years ago, and nearly eight years prior to the commencement of trial in this case. Defendant has had the benefit of using money that constitute plaintiff's damages for 10 years. While the court tends to believe that it cannot award plaintiff interest on its damages from the time of breach, it also understands the frustration of plaintiff, who fought for six years on the question of liability against the government, only to have the government tell it, at the end of this laborious process, that Glendale had suffered no damages.

It has cost each side tens of millions of dollars to litigate this case. The court imagines that the total cost at this point well exceeds $100 million. It is the court's profound hope that the 120-some *Winstar* cases still pending on the court's docket will take heed. Each side now has more information on the issues involved. The court strongly believes that settlements, where fair compromise occurs, are in everyone's interest. The court calls upon all parties involved in pending cases to consider what alternatives, short of continuing litigation over the coming years, may resolve these cases fairly. It is hoped that each coordinating committee in the *Winstar* litigation will report on this question at the May meeting.

Plaintiff is entitled to $908,948,000 in restitution and non-overlapping reliance damages.

IT IS SO ORDERED.